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UNHCR's ELIGIBILITY GUIDELINES FOR ASSESSING THE INTERNATIONAL PROTECTION NEEDS OF AFGHAN ASYLUM-SEEKERS

The report is intended primarily for those involved in the asylum determination process, and concentrates on the issues most commonly raised in asylum claims lodged in various jurisdictions. The information contained does not purport to be either exhaustive with regard to conditions in the country surveyed nor conclusive as to the merit of any particular claim to refugee status or asylum. The inclusion of third party information or views in this report does not constitute an endorsement by UNHCR of this information or views.

**United Nations High Commissioner for Refugees (UNHCR)
Afghanistan
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LIST OF ABBREVIATIONS

AIHRC	Afghanistan Independent Human Rights Commission
AMF	Afghan Militia Forces
ANA	Afghan National Army
ANDS	Afghanistan National Development Strategy
ANP	Afghan National Police
BPHS	Basic Package of Health Services
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DDR	Disarmament, Demobilization and Reintegration
EPHS	Essential Package of Hospital Services
IARCSC	Independent Administrative Reform and Civil Service Commission
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Persons
IED	Improvised Explosive Devices
ISAF	International Security Assistance Force
MAPA	Mine Action Programme for Afghanistan
MORR	Ministry of Refugee and Repatriation
MP	Member of Parliament
NDS	National Directorate of Security

OP-CRC-AC	Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
OP-CRC-SC	Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
PDPA	People's Democratic Party of Afghanistan
PRTs	Provincial Reconstruction Teams
SHAs	Suspected Hazardous Areas
SNTV	Single Non-Transferable Vote
UNAMA	United Nations Assistance Mission in Afghanistan
UNMACA	United Nations Mine Action Centre for Afghanistan
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UXO	Unexploded Ordnance
VBIED	Vehicle Borne Improvised Explosive Device

EXECUTIVE SUMMARY

A. Current situation in Afghanistan

The fall of the Taliban regime in December 2001 triggered dramatic developments in Afghanistan. In the political sphere, the country held a free election for the Presidency, adopted a new Constitution and instated a National Assembly. Taliban-imposed restrictions, including on girls education and with respect to women's fundamental rights were lifted in law, if not always in practice, and the donor community pledged support to the country's development. There was hope, both in Afghanistan and abroad, that with the international community's assistance, the country could turn a new page on decades of violence and impoverishment. This optimism was reflected in the return home of over 4 million Afghans since 2002.

Indeed, there have been marked improvements in some areas, such as access to health care and education. However, success in economic development and, more crucially, establishing a secure environment, has proved elusive. A re-invigorated insurgency has stepped up attacks and is affecting an ever-increasing proportion of the country. Violence connected to counter-insurgency operations and a record number of suicide bombings creates fresh displacement and discourages the return of refugees from abroad. Poppy growing and related drug-trafficking, linked to the deteriorating security situation, compounds efforts to provide safety and access to legitimate livelihoods. The reach, and indeed in some cases the presence, of the central Government is limited in many districts of conflict-affected provinces.

These Eligibility Guidelines, the first published for external use by UNHCR since the fall of the Taliban, are intended to assist, amongst others, those involved in the adjudication of individual claims for refugee status and policy makers concerned with Afghan asylum-seekers and refugees. In addition to providing an overview of the current political, security and socio-economic situation in Afghanistan, this document sets out groups considered particularly at risk in Afghanistan and elaborates on the reasons for this risk. UNHCR's analysis of the applicability of the exclusion clauses and the internal flight alternative concept is also provided. Finally, recommendations are offered with respect to those requiring international protection yet who are outside the 1951 Convention criteria and those whose return is not sustainable due to specific vulnerabilities.

B. Assessing the international protection needs of Afghan asylum-seekers

Under the refugee definition of the 1951 Convention, an applicant's fear is well-founded if there is a reasonable possibility that the harm feared, or some other form thereof, will occur. Whether a fear is well-founded needs to be determined in the context of the situation in the country of origin, taking into account the personal profile, experiences and activities of the applicant, and, where relevant, others. With regard to Afghan claims, family, political and tribal links also need to be considered, as these are traditionally the crucial means to obtain protection and economic survival. Further, given the general non-availability of effective State protection, particularly but not only in conflict-affected areas of Afghanistan, careful attention should be paid to persecution from non-State actors.

There is no definition of the term “persecution” in international law. A threat to life or freedom, other serious harm or serious violations of human rights would constitute persecution. Severe discrimination could also amount to persecution, in particular where livelihood is threatened. Discriminatory measures that are not of a serious character by themselves may amount to persecution on a cumulative basis.

In order to fall within the refugee criteria, there must be a nexus between the relevant act or measure and least one of the 1951 Convention grounds. Afghan woman, in most part, are required to follow particular codes of behavior. Where a woman refuses or otherwise does not conform her behavior in accordance with this code, and faces punishment as a result, she may have a well-founded fear of persecution. Failure to conform to the conventional roles and restrictions on women’s conduct can be viewed as either linked to the ground of religion and/or political opinion, as non-conformity can be seen as opposing traditional power structures.

1. Summary of main groups at risk

Afghans perceived as critical of factions or individuals exercising control over an area

Afghans expressing their political opinions are exposed to risk if these opinions are perceived as opposing the interests of local and regional commanders, powerful factions or armed opposition forces, primarily the *Taliban* and forces allied with the *Taliban* movement or with veteran Pashtun warlord *Gulbuddin Hekmatyar*’s groups. These risks extend but are not limited to journalists and those persons known to have political affiliations different from those of persons linked to armed factions exercising *de facto* power at the local level.

Government officials

Government officials, including local and district officers, judges, and law enforcement personnel are increasingly targeted for intimidation and assassination, particularly in areas where the government’s presence is limited. Targets at times receive “night letters” warning them of attacks if they continue working for the Government or cooperating with international forces.

Ethnic minorities in certain areas

Continuing efforts to address the problems faced by persons residing in areas where they constitute an ethnic minority are reflected in a more tolerant climate in some localities. However, such minorities may still face persecutory acts, such as physical abuse and detention, or discrimination amounting to persecution by local power-holders in some areas. Where it occurs, discrimination often manifests itself in terms of access to education and other services, political representation and with regard to land and property.

Converts from Islam to other faiths

Afghans suspected or accused of having converted from Islam to Christianity or other faiths risk persecution. The risk emanates from family and/or tribe members as well as the broader community. Severe punishment within the legal system is also possible for those who do not recant their conversion.

Women with specific profiles

Afghan women, both in urban and rural areas, must conform to conservative and traditional norms of behaviour in order to be safe from physical and psychological violence or abuse. Those at heightened risk include women who are perceived as or actually transgressing prevailing social mores, foreign wives of Afghans, and women without male protection. Single women without male protection, (husband, father, brother or extended family member) will have difficulty both in sustaining themselves, given social restrictions on travelling in public without a male escort in many areas, as well as physical protection problems. Women who suffer domestic violence and are fortunate enough to find accommodation in one of the few shelters available are unable to be integrated elsewhere in the country. Without an alternative durable solution, most eventually return to their family after assurances of safety have been negotiated. This situation reflects the inability for single women to reside safely in Afghanistan without a male family member to provide the traditional protection function.

Unaccompanied children

Unaccompanied children in Afghanistan are at particular risk of violence and exploitation, including child trafficking and child labour. The government does not have the capacity to provide protection or shelter for all those at risk. Those children without at least extended family support in Afghanistan are likely to experience homelessness and abuse.

Victims of serious trauma (including sexual violence)

There is very limited psychosocial trauma support in Afghanistan. Further, in more conservative areas, social mores leave victims of rape or other sexual abuse subject to family rejection and social ostracism and, thus, to the loss of traditional protection mechanisms. Victims of such trauma may thus risk further maltreatment if their being a victim of sexual violence becomes known.

Individuals at risk or victims of harmful traditional practices

Harmful traditional practices in Afghanistan, including forced and early marriage, honour killings, detention for behaviour not formally criminalised under national law, and blood feuds, impact both men and women though the latter are disproportionately affected. Women without effective male or family-support and single women of marriageable age are uncommon in Afghanistan, and continue to be viewed with some suspicion. They face a high risk of being married off by their families against their will. Single women are likely to be ostracized by the Afghan community or fall prey to malicious gossip which could destroy their reputation and social status. This exposes them to an increased risk of abuse, threats, harassment and intimidation by Afghan men, including risk of being kidnapped, sexually abused and raped. In the majority of these cases, the Government is not in a position to effectively protect women.

Homosexuals

Open homosexual relations are not possible in Afghanistan given conservative social mores. In addition to gays and lesbians risking violence from family or community members, most interpretations of the applicable criminal law indicate that homosexual acts would lead to severe punishment were they to come to the attention of authorities.

Afghans associated with international organizations and security forces

Afghans working or associated with international organizations and security forces, in areas where there are anti-Government insurgent activities or infiltrations of *Taliban* and *Hezb-e-Islami* forces, are at increasing risk of being targeted.

Those attacked include civilian workers, such as truck drivers or construction workers, as well as interpreters, humanitarian workers and journalists.

Landowners

Landowners seeking restitution or compensation for land or property taken by powerful commanders or local authorities risk violence and/or detention unless they have political, tribal or family protection. Court decisions supporting the legal rights of such property owners do not translate into effective national protection, which depends on the local authorities' ability and willingness to assist in such disputes.

Afghans associated with the People's Democratic Party of Afghanistan

While many former PDPA members and officials of the former communist regime are able to enjoy protection through family, tribal or political ties, others, unable to rely on community links to provide protection, remain at risk due to their prior political affiliation. Such risk extends to high ranking or publicly known PDPA figures, their family members, as well as security officials. While at particular threat of retaliatory violence are those associated with human rights violations perpetrated by the Communist regime, asylum applications of those who served in the military, police and security service, as well as some high ranking party and officials in particular ministries, will require scrutiny under the exclusion clauses under the 1951 Convention.

2. Exclusion

Given the long history of serious and widespread human rights abuse and violations of international humanitarian law in Afghanistan, exclusion considerations may well arise in individual claims for refugee status. Such scrutiny should take place on an individual basis and only after it is determined that the applicant meets the criteria for refugee protection as outlined herein. As noted above, this is particularly the case for Afghans associated with the military, police, security services and high-ranking Government officials of particular ministries during the Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah regimes.

Many of the activities of members of armed groups resisting the communist regimes and the Soviet occupation – from 27 April 1978 until the fall of Najibullah in April 1992- amounted to war crimes and crimes against humanity, both against combatants of rival factions and against civilians. Similarly, between 1992 and 1996 armed conflict between various factions was also accompanied by serious violations of international human rights law and humanitarian law.

The applicability of the exclusion clauses will need to be evaluated also in relation to members and military commanders of the *Taliban*, *Hezb-e-Islami Hikmatyar* and other armed groups currently involved in Afghanistan's insurgency.

3. Additional Considerations

As mentioned above, the refugee definition requires a link to one or more of the grounds enumerated in the 1951 Convention. Where such a nexus does not exist, eligibility for a complementary form of protection, or in the case of UNHCR adjudication, mandate refugee status under the extended refugee definition, should be considered for those fleeing or unable to return to Afghanistan due to serious and indiscriminate threats to life, physical integrity or freedom. Significant areas of Afghanistan are still active combat zones and/or are not under operational government control. Given the lack of effective national protection available and the accompanying risk of violence, international protection should be favourably considered for persons originating from these areas. A non-exhaustive list of the risks entailed includes the following:

- intensified counterinsurgency activities, including aerial bombings, by ISAF/NATO, which have escalated into open warfare in the south, southeast and eastern provinces;
- indiscriminate attacks by anti-Government elements, through, *inter alia*, the consistent use of indiscriminate types of warfare (IED on the roads, missile attacks, bombs, and suicide bomb attacks) including attacks on “soft targets” such as schools, teachers, and religious figures;
- acts of intimidation, involving arbitrary killings, abductions and other threats to life, security and liberty, by anti-Government elements and by regional warlords, militia commanders and criminal groups; and
- illegal land occupation and confiscation with limited possibilities for redress.

Further, UNHCR urges States to exercise caution, for humanitarian reasons, when considering return for those with very specific vulnerabilities. Return and reintegration will not be viable, unless family and/or community support is available, for single parents with small children, the elderly and ill or disabled persons who cannot work.

4. Internal flight or relocation alternative

In the context of Afghanistan, UNHCR considers that an internal flight or relocation alternative for those fleeing persecution or generalized violence is generally not available. Local commanders and armed groups are often able to extend their influence beyond local areas due to links to more powerful actors, including at the central level. Due to limited capacity and on-going conflict, State authorities are largely unable to provide effective protection from non-State actors.

Extended family and community structures within Afghan society are the predominant means for obtaining protection and economic survival, including access to accommodation. Thus, it is very unlikely that Afghans will be able to lead a relatively normal life without undue hardship upon relocation to an area to which they have no effective links, including in urban areas of the country.

5. Cessation due to change in circumstances

Despite positive and significant achievements since 2002, Afghanistan’s progress to durable peace and development is uncertain. The deteriorating security situation is marked by heightened levels of anti-Government violence in areas previously thought safe. The intensity

of violence, whether by anti-Government elements, counterinsurgency operations, or local militia commanders, has caused internal displacement and discouraged refugee return. As the national security forces have increasingly struggled to exercise authority in significant parts of the country, the cessation clauses of Articles 1C (5) or (6) of the 1951 Convention cannot appropriately be invoked.

I. INTRODUCTION

These Guidelines are divided into three sections including this Introduction (Section I). Section II provides background information regarding Afghanistan, including a description of the national legislative framework, governing and political structures and its military infrastructure. Information regarding the security environment, human rights situation and the socio-economic context is provided, including the availability of land and housing, as these subjects are important to both determining international protection needs and informing those considering voluntary return. This section ends with an overview of internal displacement, a continuing phenomenon in Afghanistan, and considerations to take into account with regard to the return of Afghans.

Section III provides detailed country-of-origin information relevant to the assessment of the international protection needs of Afghan asylum-seekers. It sets forth the main groups considered particularly at risk, elaborates the nature of those risks and, where relevant, the extent to which national protection is available.

In the context of assessing asylum claims from Afghanistan, there will be cases of individual asylum-seekers who, after an individual assessment, are found to be at risk of persecution but not deserving of international protection under the 1951 Convention. Section III thus provides guidance on the profiles of persons whose claims for protection may trigger consideration of the Convention's exclusion clauses.

Given the open conflict in Afghanistan, increasing frequency of indiscriminate attacks on civilians and the lack of national protection available, there will be cases in which the granting of international protection is warranted even in the absence of a specific link to the criteria enumerated in the 1951 Convention. Section III discusses this situation, listing the security risks entailed. In this context, it should be noted that access to conflict-affected regions is severely curtailed for United Nations' staff, affecting monitoring, project implementation and protection activities. Given the fluid situation with regard to insecurity, a district level security assessment is not offered in this document.

Section III also includes a brief summary of groups that may not be found in need of international protection following determination of their claims but for whom States nonetheless may wish to exercise caution in respect to forced return for humanitarian reasons.

Finally, Section III sets out guidance on the availability of an internal flight alternative and the applicability of the cessation clauses found in Article 1C (5) and (6) of the Geneva Convention.

II. THE SITUATION IN AFGHANISTAN¹

A. *General background*

Afghanistan is a land-locked country of 647,500 square kilometres. It shares borders of 5,529 kilometres with six neighbouring states: Pakistan (2,430 km), Tajikistan (1,206 km), Iran (936 km), Turkmenistan (744 km), Uzbekistan (137 km) and China (76 km). The country is mountainous with only 12 percent of arable land, 3 percent of land under forest cover and about 46 percent under permanent pastures.²

The country is divided into 34 provinces³ – with two new provinces, Panjshir and Daikundi created in 2004 – comprising 361 districts,⁴ administered as follows:

- Provinces are the largest administrative units, each headed by a Governor (*Waali*), who is generally appointed by the President. Governors report to the Minister of Interior. At present, the only female Governor is the Governor of Bamyan, Mrs. Habiba Surabi.
- Cities (mainly provincial capitals and urban areas) are administrative units headed by mayors and each consisting of several municipal wards, which in turn are headed by the municipal ward mayor. Mayors of major cities are currently appointed by the President but will ultimately be elected in accordance with the electoral and municipal law.
- Districts (*Woluswali*) are decentralized administrative units within a province – mainly in the rural areas, headed by district administrators. District Governors are nominated by the Provincial Governors and appointed by the Minister of Interior. Pursuant to Presidential Decree No. 36, 34 provinces and 361 districts and municipal wards – including district centres without wards – are designated as electoral constituencies.⁵
- Villages form the basic communities within rural districts, whilst *guzars* (neighbourhoods) are sub-divisions of *nahiyas* (municipal wards).

¹ This paper covers events in Afghanistan from June 2005 up to November 2007.

² Central Intelligence Agency, *The World Factbook: Afghanistan*, 6 December 2007, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (further: “CIA, *World Factbook: Afghanistan*”).

³ *Afghanistan Online*, “Geography – Provinces”, 5 October 2005, available at <http://www.afghan-web.com/geography/provinces.html>.

⁴ Sixty-eight districts cannot, at present, be mapped, as the exact boundaries are yet to be determined. See Presidential Decree No. 36 for Determining Electoral Constituencies (*Hawzah*) of the *Wolesi Jirga* (House of the People of the National Assembly), signed on 5 June 2004, available at [http://www.jemb.org/eng/Legal Framework/Basic Legislation/Decree on Electoral Constituencies \(English\).pdf](http://www.jemb.org/eng/Legal Framework/Basic Legislation/Decree on Electoral Constituencies (English).pdf), and Article 11 of the Electoral Law enacted by Presidential Decree No. 28, signed in June 2004, available at <http://www.jemb.org/eng/Legal Framework/Basic Legislation/Electoral law/English Decree.pdf> (further: “Electoral Law”).

⁵ The delimitation of district electoral boundaries revealed disputes over the definition of districts and difficulties in reconciling established pre-war administrative districts with *de facto* districts, which were established during the war and to which administrators had been appointed. The Cabinet has recently decided that the National Assembly would need to settle this complex issue. As a result, District Council elections were postponed. See: UN General Assembly, *The situation in Afghanistan and its implications for international peace and security. Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan*, A/59/744–S/2005/183, 18 March 2005, pp. 2-3, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d791844>.

Exact figures are not available, but estimates put the national population at 24 million, the majority of which resides in rural areas (71.2 percent). Some 28.8 percent are living in urban areas and the population growth rate is estimated to be 2.5 percent per year.⁶ Before the conflict, an estimated 80 to 85 percent of the Afghan population was believed to depend directly or indirectly on agriculture, a feature that may now be changing due to movements to urban areas.⁷ About four million registered Afghans still live abroad, the majority in the neighbouring countries of Iran (920,000)⁸ and Pakistan (2.15 million).⁹

The official languages are Dari and Pashtu,¹⁰ spoken by 50 percent and 35 percent of the population, respectively.¹¹ The Constitution stipulates that the Turkic languages (i.e. Uzbeki, Turkmen, Baluchi, Pashai, Nuristani and Pamiri (*Alsana*)) are the third official languages in areas where spoken by the majority the population.¹²

In terms of ethnic composition, the Constitution states that the nation of Afghanistan is comprised of the following ethnic groups: Pashtun, Tajik, Hazara, Uzbek, Turkmen, Baluch, Pashai, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahui and others:¹³

- Pashtuns are the largest group (about 42 percent) and are divided into two main subgroups: Durrani and Ghilzai, themselves divided into sub-groups and tribes. While most of the Pashtuns are settlers, some of them, the Kuchis, lead a semi-nomadic or nomadic life based on animal husbandry.
- Tajiks (about 27 percent) are Persian (Dari) speaking Afghans.
- Hazaras (about 9 percent), Uzbeks (about 9 percent), Turkmen, Baluch, Pashai, Nuristani, Aymaks, Arab, Qirghiz, Qizilbash, Gujur, Brahui and other smaller groups (13 percent).¹⁴

The Afghan Constitution guarantees “equality among all ethnic groups and tribes”¹⁵ and affirms that discrimination is prohibited.¹⁶

⁶ United Nations Development Programme, *Afghanistan National Human Development Report 2004 – Security with a Human Face: Challenges and Responsibilities*, 21 February 2005, available at <http://www.undp.org/dpa/nhdr/af/AfghanHDR2004.htm> (further: “UNDP, Afghanistan Human Development Report 2004”). See also the Afghanistan Central Statistics Office, “Population”, available at <http://www.cso-af.net/cso/index.php?page=14&block=6>, and “Census”, available at <http://www.cso-af.net/cso/index.php?page=14&language=en&block=2&menutitle=Census>.

⁷ Afghanistan Central Statistics Office, “GDP”, available at <http://www.cso-af.net/cso/index.php?page=21&language=en&menutitle=GDP>.

⁸ “Data Registration of Afghan refugees in Iran”, Amayesh II Registration, Government of Iran, May 2006.

⁹ “Registration of Afghans in Pakistan”, UNHCR/Ministry of States and Frontier Region Government of Pakistan, 2007.

¹⁰ Article 16 of the Constitution of Afghanistan, available at [http://www.jemb.org/eng/Legal_Framework/Legislation_of_Reference/Constitution/Constitution_\(English\).pdf](http://www.jemb.org/eng/Legal_Framework/Legislation_of_Reference/Constitution/Constitution_(English).pdf) (further: “Constitution”).

¹¹ CIA, *World Factbook: Afghanistan*, see above footnote 2.

¹² Article 16 of the Constitution, see above footnote 10.

¹³ Article 4 of the Constitution, see above footnote 10.

¹⁴ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Country Report Afghanistan*, 11th European Country of Origin Information Seminar (Vienna, 21-22 June 2007), November 2007, p. 2, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473451a31e> (further: “ACCORD, Country Report Afghanistan”). See also CIA, *World Factbook: Afghanistan*, see above footnote 2.

¹⁵ Article 6 of the Constitution, see above footnote 10.

¹⁶ Article 22 of the Constitution, see above footnote 10.

Islam is the official religion in Afghanistan.¹⁷ The majority are Sunni Muslims (80 percent), while the Shi'a – including a small group of Ismaili – represent 19 percent of the population.¹⁸ Afghanistan is home to minority Hindus and Sikhs. Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of the Constitution and other laws.¹⁹

B. Political developments

The political transition, which began in Afghanistan with the Bonn Process²⁰ (2002-2005), entailed important political developments, including the free election of the President²¹ and the adoption of a Constitution,²² and was completed with the inauguration of Afghanistan's new National Assembly.²³ The Government's capacity to administer the country and its structure remain, however, very much in a phase of transition. While significant progress has been made towards institution building and accountability, the public sector reforms, such as the salaries, selection and technical expertise of civil servants, will take significant time, in particular at the provincial and district levels.²⁴ Furthermore, political, institutional and economic achievements are increasingly under threat as the security situation in the country has progressively deteriorated in the southern, southeastern, eastern, central and western parts of the country due to the growing number of armed attacks by insurgent forces.²⁵ The deteriorating security situation is compounded by the marked increase in poppy cultivation and related drug trafficking in these regions.²⁶

The partnership between the international community and Afghanistan has been reaffirmed through a road map outlined in the Afghanistan Compact,²⁷ which constitutes a multi-year

¹⁷ Article 2 of the Constitution, see above footnote 10.

¹⁸ ACCORD, *Country Report Afghanistan*, p. 2, see above footnote 14. See also CIA, *World Factbook: Afghanistan*, see above footnote 2

¹⁹ Article 2 of the Constitution, see above footnote 10.

²⁰ In December 2001, a number of prominent Afghans met under UN auspices in Bonn, Germany, to reach agreement on an interim governing structure for the country, pending the establishment of a permanent broad-based, representative and democratically-elected government. The Bonn Agreement set out the process for drafting a new constitution and holding presidential and parliamentary elections. It also established the Afghan Interim Authority (AIA), made up of 30 members, headed by a chairman, which was inaugurated on 22 December 2001 with a six-month mandate.

²¹ The Presidential Elections were held on 9 October 2004. See Afghanistan Joint Electoral Management Body, *Statement of the Joint Electoral Management Body (JEMB) on the date of the elections*, 9 July 2004, available at http://www.unama-afg.org/docs/nonUN_Docs/Electoral_Docs/JEMB_statement&releases/JEMB Statement on Elections-English.doc.

²² The Constitution was adopted on 3 January 2004. See above footnote 10.

²³ President Karzai inaugurated the first session of the National Assembly on 19 December 2005. See Islamic Republic of Afghanistan, Office of the President, "Composition of the National Assembly", available at: <http://www.president.gov.af/english/composition.msp>.

²⁴ UN Security Council, *Report of the Security Council Mission to Afghanistan, 11 to 16 November 2006*, S/2006/935, 4 December 2006, available at <http://www.un.org/Docs/sc/missionreports.html> (further: "UN SC, Report 11 to 16 November 2006").

²⁵ UN General Assembly, *The situation in Afghanistan and its implications for international peace and security: report of the Secretary-General*, A/62/345-S/2007/555, 21 September 2007, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46fb71e32> (further: "UN GA, Situation in Afghanistan 21 September 2007").

²⁶ It is reported that in 2006 the output of opium rose by 51 percent and the areas under cultivation by 59 percent. See the Economist Country Report – 2006, *Economist Intelligence Unit*.

²⁷ The "Afghanistan Compact" was adopted at the London Conference On Afghanistan, London 31 January – 1 February 2006, available at <http://www.and.s.gov.af/ands/I-ANDS/ands-documents.asp?page=883736&numbpar=c&lang=eng&cont=right&class=dari> (further: "Afghanistan Compact").

(2006-2010) strategic framework for the furtherance of peace, stability and the promotion of equitable and broad-based economic growth. In line with the Afghanistan National Development Strategy (ANDS),²⁸ the Afghanistan Compact articulates the partnership in relation to three inter-related pillars: (1) security; (2) governance, rule of law and human rights; and (3) economic and social development.²⁹ The Compact stresses the interconnectedness between the three pillars. A set of specific and time-bound benchmarks has been agreed for each pillar. Counter-narcotics and the fight against poppy cultivation are reflected as a cross-cutting issue. In the area of governance, rule of law and human rights, the Afghanistan Compact places a distinct emphasis on establishing functioning institutions at the provincial level. These institutions include civil administration, police, prisons and the judiciary. Coupled with efforts to work towards civil service reforms by introducing a merit-based system in public administration, renewed efforts at addressing rising levels of corruption are expected by the Government.

The ANDS expressed the Government's plan and priorities to achieve its development vision.³⁰ An Interim-ANDS (I-ANDS) was completed at the end of 2005 as a preliminary step, pending the preparation of a full-ANDS for the period 2007-2010.³¹

Since 2002, progress has been made in the reconstruction of the country and in the gradual expansion of the Government's basic social service programmes including in the areas of education and health. Nonetheless, access to basic health and education facilities, particularly in rural areas, remains very limited.³² Poverty and food insecurity are additional challenges for many in Afghanistan.³³

In terms of internal political developments, the two houses of Parliament have slowly increased their influence within the governing structure as reflected by recent and unprecedented discussions on the new budget, the media and the amnesty laws. The relationship between the legislative and the executive powers is thus dynamic and may change further as new political alliances form within the Parliament creating a counter-balance to the power of the executive branch.³⁴

²⁸ See ANDS official website: <http://www.ands.gov.af/>.

²⁹ In accordance with the Afghanistan Compact (see above footnote 27), the Government Oversight Committee is responsible for the overall direction and guidance for the implementation of the ANDS. Working under the overall guidance of the Oversight Committee, the ANDS Consultative Group (CG) Standing Committee led and chaired by the Minister of Finance, is responsible for the management, direction, and coordination and monitoring of the implementation of the ANDS. See ANDS documents, available at <http://www.ands.gov.af/ands/I-ANDS/ands-documents.asp?page=883736&numbpar=c&lang=eng&cont=right&class=dari>.

³⁰ The development vision of the Afghan Government is expressed in both the Afghanistan Compact and the 2005 Millennium Development Goals Report (Vision 2020). See above footnote 27, and Islamic Republic of Afghanistan, *Millennium Development Goals, Country Report 2005 – Vision 2020*, 2005, available at: http://www.ands.gov.af/src/src/MDGs_Reps/MDGR_2005.pdf (further: "MDG Report 2005").

³¹ ANDS, "Key Facts on the ANDS", available at http://www.ands.gov.af/src/jcmb/jcmb2/col1/4.1_Key_facts_on_ANDS_English_.pdf

³² Afghanistan Independent Human Right Commission, *Economic and Social Rights in Afghanistan II*, August 2007, available at http://www.aihrc.org.af/Rep_Eng_Economic_Soc_Rights_II_30_aug_2007.htm (further: "AIHRC, *Economic and Social Rights*").

³³ AIHRC, *Economic and Social Rights*, see above footnote 32. The full text of the International Covenant on Economic, Social and Cultural Rights is available at <http://www2.ohchr.org/english/law/cesr.htm>.

³⁴ UN Security Council, *Report of the Secretary-General on the Situation in Afghanistan and Its Implications for International Peace and Security*, A/61/799–S/2007/152, 15 March 2007, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=461cacc52> (further: "UN SC, *Situation in Afghanistan 15 March 2007*").

Regionally, the relationship between Pakistan and Afghanistan has been affected by security considerations with Afghanistan increasingly concerned with ongoing cross-border insurgency operations. Afghanistan has, on several occasions, called upon Pakistan to address the issue. For its part, Pakistan proclaimed its intention to fence the border, a decision which resulted in renewed criticism from Afghanistan. The large presence of Afghans in Pakistan have at various times been associated with insecurity in both countries.³⁵

In an effort to defuse tension between the two countries, in particular surrounding cross-border issues, President Karzai and President Musharraf agreed during summits in Washington DC in September 2006 and Ankara in April 2007, to prioritize efforts to tackle the insurgency and terrorism including through the establishment of a Regional Peace *Jirga* – gatherings of tribal and community leaders.³⁶ The four-day Afghan – Pakistan Peace *Jirga* that took place in August in Kabul accordingly identified the need to jointly address a wide range of common issues beginning with terrorism. On this occasion, President Musharraf acknowledged the support of *Taliban* activities inside Afghanistan provided from parts of the border regions of Pakistan.³⁷ *Jirga* participants focused on the need to pursue regional stability. The implementation and monitoring of the commitment contained in the declaration following the Peace *Jirga* will be the responsibility of a permanent 50-member Joint Peace *Jirga* Commission that will meet every two months.³⁸

Afghanistan's relationship with Iran continues to be centred on socio-economic cooperation. More recently, however, and despite public displays of mutual support and cooperation, the relationship between the two countries has been affected by the "deportee crises".³⁹ The latter began in February 2007 when the Government of Iran, through a number of press releases, announced its plan for a thorough regularization of aliens on Iranian soil, including measures to deport undocumented Afghans in 2007. The Iranian authorities followed through on their announcement on 23 April, when they started the deportation of Afghans through the Milak-Zaranj border point in southwestern Afghanistan.⁴⁰ As a result of what was perceived as a failure to promptly respond to the needs of the deportees, the Afghan National Assembly passed no-confidence votes on 10 May and 12 May 2007 against the Minister for Refugees and Repatriation, Mr. Mohammad Akbar Akbar, and the Minister for Foreign Affairs, Mr. Dadfar Ranguin Spanta, respectively. President Karzai referred the case to the Supreme Court for a ruling on whether the lawmakers could remove a Minister for matters not related to responsibilities of that ministry. At the time of writing, the Minister of Foreign Affairs was still in post, while Mr. Akbar had been replaced by Mr. Shir Mohammad Etebari as the Minister for Refugees and Repatriation.⁴¹

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ UN GA, *Situation in Afghanistan 21 September 2007*, para. 27, see above footnote 25.

³⁸ Afghanistan-Pakistan Joint Peace *Jirga* Declaration, signed in Kabul on 12 August 2007, available at <http://www.embassyofafghanistan.org/08.14.2007newsjirga.html>.

³⁹ UN GA, *Situation in Afghanistan 21 September 2007*, para. 28, see above footnote 25.

⁴⁰ Human Rights Watch, *Iran: Halt mass deportation of Afghan; Investigate abuses at three detention centers*, 19 June 2007, available at <http://hrw.org/english/docs/2007/06/18/iran16206.htm>.

⁴¹ Carlotta Gall, *Afghan Legislators Vote Out Foreign Minister*, *The New York Times*, 13 May 2007, available at <http://www.nytimes.com/2007/05/13/world/asia/13kabul.html?n=Top/News/World/CountriesandTerritories/Iran>.

C. National legal framework

1. The Constitution

The Afghan Constitution⁴² was officially signed by President Karzai on 26 January 2004. It stipulates that Afghanistan is an Islamic Republic,⁴³ and provides for an elected President, a Cabinet of Ministers, the Judiciary and a National Assembly comprising two houses – the *Wolesi Jirga* (House of the People) and the *Meshrano Jirga* (House of Elders).⁴⁴ It also provides for the equality of men and women and, while requiring adherence to the United Nations Charter and the international treaties to which Afghanistan is party,⁴⁵ states that “[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”.⁴⁶

According to Article 130 of the Constitution,⁴⁷ in the absence of relevant national legislation courts shall rule “*in pursuance of Hanafi jurisprudence*”⁴⁸ and “*within the limits set by [the] Constitution*”. Exceptionally, Article 131 of the Constitution provides that the Shi’a school of law applies in cases dealing with personal matters of followers of the Shi’a sect. Furthermore, in other cases pertaining to the followers of the Shi’a sect, where no clarification can be found in the Constitution or other laws, the courts shall rule according to Shi’a jurisprudence.⁴⁹

The international treaties to which Afghanistan is party provide an important legal framework within which national laws should be applied. Although Afghanistan’s Constitution does not specify which provisions – international or domestic – should apply where national laws do not comply with these treaties, it is a basic principle of international law that a State may not invoke its national laws or the Constitution to justify a breach of international law. It is however not clear which will prevail where an international treaty obligation is interpreted as contravening the tenets of Islam.

D. State and political structures

1. Loya Jirga

The *Loya Jirga* (Grand Assembly), serving much like a Constitutional Assembly, is composed of the members of the National Assembly and chairpersons of the Provincial and

⁴² For the full text of the Constitution of Afghanistan, see above footnote 10. For further details on the drafting process of the Constitution, see Afganistan Research and Evaluation Unit (AREU), *A to Z Guide to Afghanistan Assistance*, 5th Edition, November 2006, available at http://www.areu.org.af/index.php?option=com_content&task=view&id=13&Itemid=17 (further: “AREU, A to Z Guide”). See also Barnett R. Rubin., *Crafting a Constitution for Afghanistan*, *Journal of Democracy*, Vol. 15, No. 3, July 2004, pp. 5-19, available at www.cic.nyu.edu/archive/pdf/JOD_published.pdf.

⁴³ Article 1 of the Constitution, see above footnote 10.

⁴⁴ Chapters 3-6 of the Constitution, see above footnote 10.

⁴⁵ Article 7 of the Constitution, see above footnote 10.

⁴⁶ Article 3 of the Constitution, see above footnote 10.

⁴⁷ Article 130 of the Constitution, see above footnote 10.

⁴⁸ Among the four established Sunni schools of legal thought in Islam, the Hanafi school is the oldest, but it is generally regarded as the most liberal and as the one which puts the most emphasis on human reason. See Global Security, *Military: Hanafi Islam*, 26 April 2005, available at <http://www.globalsecurity.org/military/intro/islam-hanafi.htm>.

⁴⁹ Article 131 of the Constitution, see above footnote 10.

District Councils.⁵⁰ The Ministers, the Chief Justice, members of the Supreme Court and the Attorney General can participate in the sessions of the *Loya Jirga* without the right to vote. A *Loya Jirga* can be convened:

- when there is a need to take decisions on the issues related to the independence, national sovereignty, territorial integrity, and supreme interest of the country;
- to amend the provisions of the Constitution; or
- to prosecute the President in accordance with the provisions of the Constitution.

2. The President and Cabinet

The executive branch of Afghanistan's central Government is comprised of the Office of the President, two Vice-Presidents, the Attorney General, 25 ministers, and several independent bodies such as the National Security Department, the Central Statistics Office and other central Government agencies. In early 2006, the functions of several ministries were merged, creating a more streamlined Cabinet.⁵¹

The President is elected by direct, secret ballot for a five-year period and can serve a maximum of two terms.⁵² Candidates for the presidency designate their two vice-presidential candidates at the time of nomination. The President is elected by absolute majority of votes in direct Presidential elections. If no candidate receives over 50 percent of the votes, a run-off election is held between the top two candidates. The President is the Head of State, the Chair of the Cabinet and the Commander-in-Chief of Afghanistan's Armed Forces.⁵³ He appoints the Ministers, the Attorney General, the General Director of the Afghan Central Bank, the members of the Supreme Court and various other officials.⁵⁴ Appointments to these positions require approval of the *Wolesi Jirga* (Lower House of the National Assembly).⁵⁵

The first Afghan Cabinet following parliamentary and Provincial Councils elections was nominated by President Karzai in March 2006. The Cabinet, technocrats representing ethnic and political factions from all over the country, consists of 25 ministers and one senior minister.⁵⁶ The ministers were sworn in by President Karzai on 2 May 2006.⁵⁷

3. The National Assembly

Established by the Constitution, the National Assembly consists of two houses: the *Meshrano Jirga* (Senate or Upper House), and the *Wolesi Jirga* (House of Representatives or Lower House).⁵⁸

⁵⁰ Article 110 of the Constitution, see above footnote 10.

⁵¹ AREU, *A to Z Guide*, p.65, see above footnote 42.

⁵² Article 61 of the Constitution, see above footnote 10.

⁵³ Article 64 of the Constitution, see above footnote 10.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ For a full list of the Cabinet members, see *Afghanistan Online*, "Members of President Hamid Karzai's Cabinet", 25 September 2007, available at http://www.afghan-web.com/politics/cabinet_members.html.

⁵⁷ Islamic Republic of Afghanistan, "Cabinet", available at <http://www.president.gov.af/english/cabinet.msp> [accessed on 14 December 2007].

⁵⁸ Article 82 of the Constitution, see above footnote 10.

The National Assembly is the highest legislative organ,⁵⁹ and is expected to review all laws adopted by the Cabinet and President during the interim and transition period. It is impossible to be simultaneously a member of both the *Meshrano Jirga* and *Wolesi Jirga*.⁶⁰ In addition, members of the National Assembly must be Afghan citizens.⁶¹ Candidates must be 25 years of age or older at the date of candidacy for the *Wolesi Jirga*, and 35 or older at the date of election or appointment to the *Meshrano Jirga*.⁶²

The new National Assembly convened for the first time on 19 December 2005, following the September 2005 legislative elections.⁶³

The National Assembly has the authority to:⁶⁴

- ratify, modify, or abrogate laws and legislative decrees;
- approve plans for economic, social, cultural and technological development;
- approve state budgets, grant permission for obtaining loans;
- create, modify and/or dissolve administrative units;
- ratify or withdraw from international treaties and agreements; and
- other powers as specified in the Constitution.

Policies and legislation can be initiated by the Office of the President, individual ministries or the National Assembly,⁶⁵ and become law after passing through both houses of Parliament and being endorsed by the President.⁶⁶

4. **Wolesi Jirga**

The *Wolesi Jirga* is the Lower House (House of Representatives) of the National Assembly. Members of the *Wolesi Jirga* are elected for five years by, free, direct and secret ballot in provincial constituencies.⁶⁷ There are currently 249 seats in the *Wolesi Jirga*;⁶⁸ the Constitution stipulates that the maximum number of seats is 250.⁶⁹ Seats are distributed among the provinces according to population size. Sixty-eight seats, an average of two from each province, are reserved for women.⁷⁰ Ten seats are reserved for the *kuchi* (nomad) population, three of which must go to women. The individuals composing the Lower House reflect Afghanistan's political and ethnic diversity, including a large number of professionals, a contingent of secularists (some of whom were prominent in the communist Government of the 1980s), many former commanders (*jihadis*), and a small number of former members of the *Taliban* movement. Some members of the National Assembly are accused of serious human rights abuses giving rise to concerns regarding impunity and the provision of national

⁵⁹ Article 81 of the Constitution, see above footnote 10.

⁶⁰ *Ibid.*

⁶¹ Article 85 of the Constitution, see above footnote 10.

⁶² *Ibid.*

⁶³ See Islamic Republic of Afghanistan, Office of the President, "Composition of the National Assembly", available at <http://www.president.gov.af/english/composition.msp>.

⁶⁴ Article 90 of the Constitution, see above footnote 10.

⁶⁵ Article 95 of the Constitution, see above footnote 10.

⁶⁶ Article 94 of the Constitution, see above footnote 10.

⁶⁷ Article 83 of the Constitution, see above footnote 10.

⁶⁸ Islamic Republic of Afghanistan, Office of the President, "Composition of the National Assembly", available at <http://www.president.gov.af/english/composition.msp>.

⁶⁹ Article 83 of the Constitution, see above footnote 10.

⁷⁰ *Ibid.*

protection.⁷¹ In an encouraging development, of the 68 women elected to the Lower House, several received sufficient votes to secure their seats without recourse to the quotas set for women in the electoral law.⁷² Mohammad Yunus Qanooni, a former presidential candidate, was elected as the Speaker of the Lower House.⁷³

5. Meshrano Jirga

The *Meshrano Jirga*, the Upper House of the National Assembly, also referred to as Senate, comprises 102 members.⁷⁴ The Constitution stipulates that members of the *Meshrano Jirga* shall be elected and appointed as follows:⁷⁵

- from among the members of each Provincial Council; the respective Council elects one person for a period of four years;
- from among the District Councils of each province; the respective Council elects one person for a period of three years;
- the President shall appoint the remaining one-third of the members from among experts and experienced personalities (including two representatives of the disabled and impaired and two representatives of the nomads – *Kuchi*) for a period of five years. Fifty percent of these individuals appointed by the President shall be women.

In November 2005, in accordance with the Electoral Law,⁷⁶ each Provincial Council elected from among its members two representatives to serve in the Upper House. Of the 64 elected officials, six were women.⁷⁷ On 9 December, with the certification of the Joint Electoral Management Body, President Karzai nominated 34 members – including 17 women – to the *Meshrano Jirga*.⁷⁸ As District Council elections were postponed, the *Meshrano Jirga* does not yet comprise members elected from among those councils. The electoral process was concluded on 19 December 2005, with the inauguration of the National Assembly. The *Meshrano Jirga* elected the former President of Afghanistan, Sibghatullah Mojaddedi, as its speaker.⁷⁹

In the first months of the National Assembly's proceedings, debates focused primarily on administrative matters and on issues of public concern such as threats to the country's security and whether female parliamentarians should be accompanied by male relatives during official travel. In 2006, the National Assembly developed into a vibrant forum for debate on a range of issues and provided an increasingly relevant check and balance to the executive branch. The National Assembly reviewed some 200 laws and Presidential decrees issued over the last three years. National Assembly rules and procedures were debated, including procedures on the vote of confidence on Cabinet appointments. In this regard, the

⁷¹ UN General Assembly, *The situation in Afghanistan and its implications for international peace and security*, A/60/712, 7 March 2006, para. 6, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4415a1cd21> (further: "UN GA, *Situation in Afghanistan* 7 March 2006").

⁷² *Ibid.*

⁷³ UN GA, *Situation in Afghanistan* 7 March 2006, para. 8, see above footnote 71.

⁷⁴ Islamic Republic of Afghanistan, Office of the President, "Composition of the National Assembly", available at <http://www.president.gov.af/english/composition.msp>.

⁷⁵ Article 84 of the Constitution, see above footnote 10.

⁷⁶ The Electoral Law, see above footnote 4.

⁷⁷ UN GA, *Situation in Afghanistan* 7 March 2006, para. 7, see above footnote 71.

⁷⁸ *Ibid.*

⁷⁹ UN GA, *Situation in Afghanistan* 7 March 2006, para. 8, see above footnote 71.

Lower House decided on 27 February 2007 to exercise its constitutional authority to review and approve the Cabinet on an individual, rather than collective, basis.⁸⁰

Both houses of Parliament have been actively reviewing and amending various legislation, including: the Provincial Council Law, the Prison Law, the Juvenile Justice Code, the Counter Narcotics Law, the Environmental Law, the Law on the Commission for the Implementation of Constitution, and the Law on the Structure of Government.

6. Provincial Councils

The 34 Provincial Councils⁸¹ have each between nine and 29 members depending on the size of the province's population, who are elected in a single provincial constituency. Candidates must reside in the province in which they stand for election and cannot stand simultaneously for *Wolesi Jirga* and Provincial Council elections.⁸² The revised Electoral Law states that one quarter of the seats on a Provincial Council should be reserved for women. For the 420 available seats on the Provincial Councils, 121 women were elected. Five provincial seats reserved for women remained, however, vacant until the next elections, owing to the lack of women candidates in Nangarhar, Uruzgan and Zabol provinces.

7. District Councils

In order to organize activities at the local level and provide communities with the opportunity to actively participate in the local administration, District Councils have been established. Members of these Councils are to be elected through free, general, secret and direct elections for a period of three years.⁸³ Elections have been postponed, however, until disputes over district boundaries are resolved by the *Wolesi Jirga*. In the meantime, local Development Councils, which partly assume the functions elected District Councils are expected to play in the future, have been established in many areas, through appointments by provincial authorities rather than election.

8. Political parties

Afghan citizens have the right to form social organizations and political parties, provided their programme and charter are not contrary to the principles of Islam, the provisions and values of the Constitution, and that their organizational structure and financial sources are made public.⁸⁴ Furthermore, they are prohibited from having military or paramilitary aims, and structures or affiliation to foreign political parties.⁸⁵

⁸⁰ UN GA, *Situation in Afghanistan 7 March 2006*, paras. 8-9, see above footnote 71. The National Assembly also devoted four days of debate to the emerging threats to the country's stability. In the debates in the National Assembly, a number of women representatives and lesser-known personalities played a prominent role.

⁸¹ Article 138 of the Constitution, see above footnote 10.

⁸² Pursuant to Article 84 of the Constitution, the individual selected as a member of the House of Elders shall lose membership to the related Council, and, another individual shall be appointed in accordance with the provisions of the law. See above footnote 10.

⁸³ Article 140 of the Constitution, see above footnote 10.

⁸⁴ Article 35 of the Constitution, see above footnote 10.

⁸⁵ *Ibid.*

The Law on Political Parties⁸⁶ prohibits the formation of parties based on ethnicity, language, Islamic school of thought and religion.⁸⁷ A duly formed party shall not be dissolved without lawful reasons and the decision of an authorized court.⁸⁸ An increasing number of applications for registration of political parties have been approved by the Ministry of Justice and a growing number have received accreditation.⁸⁹ The application of the Law on Political Parties, by prohibiting legitimate parties from having militia forces, has generally proved a useful tool in the disarmament and demobilization of former armed *Mujaheddin* groups and Islamic parties established prior to its promulgation.

There have been some recent developments on the political scene with regard to influential political party structures. For example, subsequent to the appointment of Mr. Zarar Ahmad Muqbel, a prominent member of *Hezbe Jamiat-e-Islami* Afghanistan, as the Minister of Interior, three independently registered political parties have merged with *Hezbe Jamiat-e-Islami*, namely (1) the *Nuhzate Meli Afghanistan*, led by Ahmad Wali Masoud; (2) the *Hezbe Itedal Meli Islami Afghanistan*, led by Qara Big Aizid Yar; and (3) the *Hezbe Afghanistan Naween*, led by Mohammad Yunus Qanoni.⁹⁰

9. Parliamentary groups in the Wolesi Jirga

In another development, a new political grouping, the United National Front,⁹¹ was inaugurated on 12 March 2007 as a broad coalition of former and current militia leaders, commanders from the anti-Soviet resistance, ex-Communist leaders, and various representatives of social and ethnic groups.⁹² Many of its members were formerly part of the United Islamic Front (better known as the Northern Alliance).⁹³ Some of the most prominent members include former Afghan President Ustad Rabbani, Parliamentary Speaker Younus Qanooni, First Vice-President Zia Massoud, Energy and Water Minister Ismail Khan, Marshall Fahim, General Dostum, former People's Democratic Party of Afghanistan (PDPA) Interior Minister Gulabzoy, former PDPA General Nur ul Haq Ulumi, and the King's grandson Mustafa Zahir. The Front will have a rotating leadership, with Ustad Rabbani taking on the first six months.⁹⁴ At the inauguration, Ustad Rabbani, presented the Front's platform, which included proposals for the introduction of a parliamentary system with a Prime Minister and a President; a change in the electoral system from a single non-transferable vote system to a party-list electoral system; the introduction of elected provincial Governors; the strengthening of the national security forces; and the closure of foreign run

⁸⁶ The Law on Political Parties was approved by the Council of Ministers on 8 September 2003 and signed by the President in Decree No. 73, dated 14 October 2003. The Law is available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d645564> (further: "Law on Political Parties").

⁸⁷ Article 6 of the Law on Political Parties, see above footnote 86.

⁸⁸ Article 35 of the Constitution, see above footnote 10.

⁸⁹ For a comprehensive list of the registered political parties, see Islamic Republic of Afghanistan Ministry of Justice, List of "Licensed Political Parties", available at <http://www.moj.gov.af/polpartieslist.html> [accessed on 14 December 2007].

⁹⁰ Islamic Republic of Afghanistan, Ministry of Justice, List of "Licensed Political Parties", available at <http://www.moj.gov.af/polpartieslist.html>.

⁹¹ For more in depth information on the United National Front, see <http://www.afgha.com/?q=node/2472>.

⁹² Agence France Press, *Afghan strongmen form 'united front'*, 3 April 2007, available at <http://www.afghanistannewscenter.com/news/2007/april/apr32007.html#3>; see also Ron Synovitz, *Afghanistan: New Political Bloc Unites Old Adversaries*, Radio Free Europe/Radio Liberty, 5 April 2007, available at <http://www.rferl.org/featuresarticle/2007/04/d0dfc5f9-e7de-4027-a98b-022e279abbe3.html>.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

prisons in Afghanistan.⁹⁵ The Front has also raised the issue of the presence, role and legal framework of foreign troops in Afghanistan, including the role of international military forces running detention centers.

Throughout 2006, several political regrouping took place and new political leaders emerged in the *Wolesi Jirga*, namely:

a) Estiqlal-e-Milli – National Independence Group

The first parliamentary group established in the Lower House was the *Estiqlal-e-Milli* (National Independence Group), under the leadership of Sayed Mustafa Kazemi, former Minister of Commerce in the Interim and Transitional Governments and Member of Parliament (MP) from Kabul, and Spokesman of the recently established United National Front. The Spokeswoman of this Group is Noorzia Atmar, MP from Nangarhar. Twenty-three MPs are members of this group.⁹⁶

b) Nezarat-e-Milli – National Monitoring Group

The second parliamentary group established was the *Nezarat-e-Milli* (National Monitoring Group), led by Mohammad Asim, an engineer and former member of *Hezb-e-Islami*, currently member of the newly established United National Front and MP from Baghlan. The Spokesman of this group is Mohammad Alim Sayee, MP from Takhar province. Twenty-one MPs are members of this group.⁹⁷

c) Taraqi Khwa – Pro-Progress Group

Taraqi Khwa (Pro-Progress Group) is the third established parliamentary group. Mohammad Nayeem Farahyee, an independent MP from Farah province, leads it. The Spokeswoman of the Group is Najla Dehqan Nejad, MP from Herat province. Mohammad Nayeem Farhayee has joined the recently established United National Front.⁹⁸

d) Khat-e-Seowom – Third Line Group

The fourth group established in the Lower House is the *Khat-e-Seowom* (Third-Line Group). It comprises 21 MPs and is headed by Shukria Barakzai, MP from Kabul. Other known members are Abdulkabir Ranjbar, MP from Kabul, Noor Akbari, MP from Daikundi, Daoud Sultanzoy, MP from Ghazni, and Hashim Wantanwal, MP from Uruzgan.⁹⁹

e) Afghanistan

The fifth group established in the Lower House is simply called “Afghanistan”. Mirwais Yasseni, former Deputy Minister for Counter Narcotics and MP from Nangarhar province, heads it. Mohammad Hussain Fahimi, MP from Saripol province, is the Deputy of the group

⁹⁵ *Ibid.*

⁹⁶ Konrad Adenauer Stiftung (KAS), *Parliamentary Bulletin*, Vol. 1 Issue 4, 9 May 2007, p. 4, available at http://www.kas.de/proj/home/pub/80/1/year-2007/dokument_id-10879/index.html (further: “KAS, *Parliamentary Bulletin*”).

⁹⁷ KAS, *Parliamentary Bulletin*, p. 5, see above footnote 96.

⁹⁸ KAS, *Parliamentary Bulletin*, p. 5, see above footnote 96.

⁹⁹ KAS, *Parliamentary Bulletin*, p. 5, see above footnote 96.

and Homira Akakhil, the Spokeswoman. When introduced in early April 2007, the group was composed of 41 MPs, thereby making it the largest single group in the Lower House.¹⁰⁰

These developments are indicative of the elected MPs' dissatisfaction with the electoral system in place in the 2005 elections, which resulted in a fragmented *Wolesi Jirga* with dominant individual leaders and little cohesion between groupings.

10. The electoral system

According to the Electoral Law, suffrage is universal for male and female citizens of 18 years of age and older.¹⁰¹ Afghanistan's first post-war election law was signed by then Interim President Karzai in May 2004. A revised version of the law was approved by Presidential Decree on 29 April 2005, ending a long debate over the system for electing representatives to the *Wolesi Jirga*. The system chosen was the Single Non-Transferable Vote.¹⁰²

11. National commissions

The Independent Administrative Reform and Civil Service Commission (IARCSC), and the Afghanistan Independent Human Rights Commission (AIHRC), established by the Bonn Agreement, continue, as elaborated upon below, to be active in building the capacity of Afghan governing institutions. With the purpose of promoting reconciliation with the *Taliban* and strengthening the overall peace process, President Karzai established in March 2005 the National Peace Commission¹⁰³ and appointed Professor Seghatullah Mujadeddi – the Head of the Upper House of the National Assembly – as its Chair. Due to the work of the Commission, some 3,500 previously armed *Taliban* joined the peace process and others were released from Guantanamo Bay and Bagram prisons. Despite the refusal of the *Taliban* leadership to respond to the calls of the Government of Afghanistan for reconciliation, the Commission continues to function, thus providing an opportunity to commanders of armed factions and low-ranking *Taliban* and *Hizb-e-Islami* members to join the peace process.

a) Independent Administrative Reform and Civil Service Commission

The IARCSC, established by the Bonn Agreement, was set up in May 2002 by Presidential Decree.¹⁰⁴ It is the governmental body mandated to coordinate the public administration reform process.¹⁰⁵

¹⁰⁰ KAS, *Parliamentary Bulletin*, pp. 2 and 5, see above footnote 96.

¹⁰¹ Article 13 of the Electoral Law, see above footnote 4.

¹⁰² Presidential Decree No. 21 on the Formation of the Independent Election Commission, signed on 19 January 2005, available at [http://www.jemb.org/eng/Legal_Framework/Decree_on_the_Establishment_of_the_IAEC_\(English\)2005.pdf](http://www.jemb.org/eng/Legal_Framework/Decree_on_the_Establishment_of_the_IAEC_(English)2005.pdf).

¹⁰³ The Commission is alternatively known as the “Independent National Commission for Peace in Afghanistan” or the “Commission for Strengthening Peace and Stability”, see: Amin Tarzi, *Afghanistan: Who Exactly Is The Enemy?*, RFE/RL, 23 November 2005, available at <http://www.rferl.org/featuresarticle/2005/11/28bc5611-dcc7-4059-bb24-8f17547aa960.html>.

¹⁰⁴ Decree No. 26 - Decree (No. 26) of the President of the Transitional Islamic State of Afghanistan, On Regulation on the Functions and Activities of the Independent Administrative Reforms and Civil Service Commission, 6 June 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d665fc2>.

¹⁰⁵ For more details, see the Islamic Republic of Afghanistan, Office of the President, “Good Governance, Rule of Law, & Human Rights – Public Administration Reform”, available at: <http://www.president.gov.af/english/np/governance.msp>.

b) Afghanistan Independent Human Rights Commission

The AIHRC was established in June 2002 by Presidential Decree¹⁰⁶ and was later anchored in the 2004 Constitution.¹⁰⁷ Its mandate and responsibilities were further regulated in the Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission.¹⁰⁸ The Commission plays an active role in raising human rights issues and making recommendations to address them. The main objective for its establishment was to create an effective, credible and sustainable national independent human rights institution¹⁰⁹ and to enhance the national capacity to promote and protect human rights.¹¹⁰

E. The justice system

The Constitution recognizes the judicial branch as an independent organ of the Islamic Republic of Afghanistan.¹¹¹ The judicial branch consists of the Supreme Court (*Stera Mahkama*), courts of appeal, and primary courts, whose structure and jurisdiction are determined by law.¹¹²

1. The Supreme Court

The Supreme Court is the highest judicial organ in Afghanistan.¹¹³ Its duties include the review of laws, decrees, international treaties and international covenants to ensure they comply with the Constitution.¹¹⁴ The Supreme Court comprises nine judges, appointed for ten-year terms by the President, with the approval of the *Wolesi Jirga*.¹¹⁵ The President assigns one of the nine judges to serve as Chief Justice. The Supreme Court manages the

¹⁰⁶ Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, 6 June 2002, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d6423d4>.

¹⁰⁷ Article 58 of the Constitution, see above footnote 10.

¹⁰⁸ Presidential Decree No. 16 on Enforcement of the Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission, 22/2/1384 (12 May 2005), available at http://www.aihrc.org.af/law_of_aihrc.pdf (further: “Law on the Structure of AIHRC”).

¹⁰⁹ As a national human rights institution, the establishment of AIHRC was guided by international standards contained in the Paris Principles (UN General Assembly, *Principles Relating to the Status of National Institutions*, G.A. Res. 48/134 of 20 December 1993, available at <http://www.ohchr.org/english/law/parisprinciples.htm>).

¹¹⁰ The Commission’s objectives are: (1) monitoring the situation of human rights in the country; (2) promoting and protecting human rights; (3) monitoring the situation of and people’s access to their fundamental rights and freedoms; (4) investigating and verifying cases of human rights violations; and (5) taking measures for the improvement and promotion of the human rights situation in the country. See Article 5 of the Law on the Structure of AIHRC, see above footnote 108.

¹¹¹ Article 116 of the Constitution, see above footnote 10.

¹¹² Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan, published in the Official Gazette on 21 May 2005, available at http://afghanistantranslation.com/Laws/Law_on_Organization_and_Jurisdiction_of_Courts_of_Afghanistan_English_rev-MGH_ET.doc (further: “Courts Law”). The Law divides the courts into three tiers: the Supreme Court, the Courts of Appeal and the Primary Courts. It allows for travelling or mobile courts in the event that they are needed and after President’s approval.

¹¹³ Article 116 of the Constitution, see above footnote 10.

¹¹⁴ Article 121 of the Constitution, see above footnote 10.

¹¹⁵ Article 117 of the Constitution, see above footnote 10.

personnel, budgets, and policy decisions of the entire national, regional and local court system.¹¹⁶

On 5 August 2006, nine new Supreme Court judges were sworn in. The new Court is perceived as moderate, technocratic and educated.¹¹⁷ Currently, the Supreme Court is composed of the following:

- Chief Justice Abdul Salam Azimi;
- Judge Mohammad Qasem Hashemizai;
- Judge Abdul Rashid Rashed;
- Judge Gholam Nabi Nawai;
- Judge Bahuddin Baha;
- Judge Zamen Ali Behsudi;
- Judge Mohammad Qasem;
- Judge Mohammad Alim Nasimi; and
- Judge Mohammad Omar Barakzai.¹¹⁸

In October 2006, Chief Justice Azimi presented the Supreme Court's five-year reform strategy¹¹⁹ to achieve the rule of law benchmarks of the Afghanistan Compact and the ANDS. The strategy incorporates, *inter alia*, a plan to systematically review judicial remuneration, appointments, promotion and discipline.¹²⁰ Efforts have also been made to fill the vacant positions within the court system and to ensure that newly-appointed judges meet higher standards of professionalism.¹²¹

2. Courts of appeal

Courts of appeal are being established in all provinces.¹²² They oversee the rulings and decisions of the primary courts and have the authority to correct, overturn, amend, confirm or repeal these rulings and decisions. They are also responsible for deciding on conflicts of jurisdiction between lower courts.¹²³

3. Primary courts

There are primary courts for five jurisdictional areas: Central Provincial Courts, Juvenile Courts, Commercial Courts, Family Issues Courts and District Courts.¹²⁴ All criminal and civil cases must first be resolved in the appropriate primary court. If there is a complaint

¹¹⁶ Articles 124 and 125 of the Constitution, see above footnote 10.

¹¹⁷ AREU, *A to Z Guide*, see above footnote 42.

¹¹⁸ *Afghanistan Online*, "Branches of Government – Judicial", available at <http://www.afghan-web.com/politics/government.html#judicial> [accessed on 14 December 2007].

¹¹⁹ See Supreme Court, *Strategy of the Judiciary of the Islamic Republic of Afghanistan With Focus on Prioritizations*, 15 April 2007, available at <http://iojt3conference.net/docs/ponencia29.pdf> (further: "Supreme Court, *Strategy*").

¹²⁰ Afghanistan Compact, see above footnote 27. See also ANDS documents, available at <http://www.ands.gov.af/ands/I-ANDS/ands-documents.asp?page=883736&numbpar=css&lang=eng&cont=right&class=dari>.

¹²¹ Supreme Court, *Strategy*, p. 4, see above footnote 119.

¹²² Article 31(1) of the Courts Law, see above footnote 112.

¹²³ Articles 33 and 34 of the Courts Law, see above footnote 112.

¹²⁴ Article 40 of the Courts Law, see above footnote 112.

based on the procedures or rulings of a primary court, the case will be decided by the appropriate Court of Appeal, which may further refer it to the Supreme Court. A high number of cases are routinely appealed, which is considered by some experts as a significant obstacle to effective judicial functioning.¹²⁵

4. The Attorney General

The office of the Attorney General is an independent body, primarily responsible for investigations and prosecution.¹²⁶ On 28 August 2006, President Hamid Karzai appointed Mr. Abdul Jabbar Sabit as the Attorney General of Afghanistan. Since his appointment, Mr Sabit has undertaken a campaign to tackle corruption.¹²⁷ He has removed a number of senior prosecutors, and several provincial and district officials have been arrested and placed under investigation. Furthermore, the first woman Chief Prosecutor was appointed in the province of Herat. Despite these developments, further reaching institutional reforms of the Attorney General's office are needed to increase efficiency in tackling corruption.¹²⁸

5. The Ministry of Justice

The Ministry of Justice, headed by Mr. Sarwar Danish, is responsible, *inter alia*, for drafting new legislation, revising the current legal framework with the aim of meeting rule of law benchmarks and ensuring compatibility with the Afghan Constitution and Afghanistan's international legal obligations, and for the administration of prisons and detention centres. In May 2005, the Ministry of Justice issued its five-year strategy entitled "Justice for All",¹²⁹ and developed a programme to improve the capacity of its legislative department, the *Taqnin*. Although the *Taqnin* has already drafted more than a hundred laws, many of which are intended to replace old legislation, progress in organizing consultations on draft legislation remains slow.

Key challenges include the drafting and revision of national laws in conformity with the Afghan Constitution and international human rights standards. The 2004 Constitution is now in force and numerous decrees and laws have been enacted according to its provisions. However, there remains a large body of legislation that was enacted by various former regimes. The status of these laws is often unclear and many are contradictory and need to be reviewed.¹³⁰

Generally, the functioning of the judicial system continues to be hampered by severe and systemic problems.¹³¹ Progress has been made in the training of judges and prosecutors and in developing capacity for legal representation. The construction and refurbishment of

¹²⁵ AREU, *A to Z Guide*, p. 73, see above footnote 42.

¹²⁶ Center for Policy and Human Development, *Afghanistan Human Development Report 2007 Bridging Modernity and Tradition: Rule of Law and the Search for Justice*, 2007, p. 79, available at <http://www.cphd.af/nhdr/nhdr07/nhdr07.html>.

¹²⁷ UNAMA, *Afghanistan Justice Sector Review*, March 2007 (further: "UNAMA, Justice Sector Review").

¹²⁸ *Ibid.*

¹²⁹ Government of the Islamic Republic of Afghanistan, Ministry of Justice, *Justice for All. A Comprehensive Needs Analysis for Justice in Afghanistan*, May 2005, available at [http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice for all MOJ Afgh.pdf](http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afgh.pdf) (further: "Justice for All").

¹³⁰ UNAMA, *Justice Sector Review*, see above footnote 127.

¹³¹ Amnesty International, *Afghanistan: Re-establishing the rule of law*, 14 August 2003, available at <http://web.amnesty.org/library/index/engasa110212003>.

courthouses and prisons is equally progressing well.¹³² Furthermore, the availability of legal aid has significantly increased in major urban centres.¹³³ The absence of strong state institutions, particularly in rural areas, low salaries for judges and prosecutors, rampant corruption, the influence of warlords and local commanders and the failure to ensure a secure environment for courts, judicial personnel, victims and witnesses continues to severely undermine the capacity of the legal system to act independently and impartially.¹³⁴ This contributes to the low level of public trust and confidence in these institutions. Implementation of laws and the application of international standards incorporated into new legislation also remains a critical problem due to a severe lack of institutional capacity.¹³⁵ Many judges are unfamiliar with the law and make decisions without any reference to the legal codes. Particularly at district level, judges' personal opinion is the primary sources of law.¹³⁶ Thus, the reach of the formal justice system varies significantly across the country and a large proportion of disputes in Afghanistan are settled in traditional rather than the formal justice system, particularly, but not exclusively, in rural areas.¹³⁷

A strategic framework for the envisaged justice sector reform was endorsed by the Government of Afghanistan in October 2005. The "Justice for All" strategy was developed through a Consultative Group on Justice chaired by the Ministry of Justice.¹³⁸ Prior to its approval, "Justice for All" underwent a wide consultation process culminating in a three-day national conference held in Kabul in August 2005.

The framework is divided into five areas of activity: law reform, institution building, access to justice programmes, traditional justice and coordination. UNAMA and UNDP have helped to establish a series of working groups with representation from relevant line ministries and international stakeholders to implement the framework's priorities.¹³⁹

Endorsed at the London Conference of January 2006, the Afghanistan Compact identified the reform of the justice system as a priority for the Afghan Government and committed the Government to achieve a number of 'high level' benchmarks by the end of 2010.¹⁴⁰ These include the legal framework required under the Constitution, functioning justice institutions, reforms to strengthen oversight mechanisms and increase professionalism, credibility and integrity of the justice institutions, and ensuring the rehabilitation of the justice infrastructure and prisons.¹⁴¹ Priority is to be given to the establishment in each province of functional institutions including prisons and the judiciary.

¹³² UNAMA, *Justice Sector Review*, see above footnote 127.

¹³³ *Ibid.*

¹³⁴ UN SC, *Situation in Afghanistan 15 March 2007*, see above footnote 34.

¹³⁵ UNAMA, *Afghanistan Justice Sector Review*, March 2007.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Justice for All*, see above footnote 129. Support was also provided by the United Nations Development Programme (UNDP), UNAMA and other key stakeholders.

¹⁴⁰ UNAMA, *Justice Sector Review*, see above footnote 127.

¹⁴¹ Afghanistan Compact, see above footnote 27.

¹⁴² There are four components of the Rule of Law Benchmark set out in the Afghanistan Compact, namely:

- a) By end of 2010, the legal framework required under the Constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public.
- b) By end of 2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible.
- c) A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of

6. Traditional dispute resolution mechanisms

Customary law prevails in Afghanistan where traditional dispute resolution mechanisms such as *Shuras*¹⁴² and *Jirgas* are often used in place of formal court systems in criminal and civil cases, including in disputes over marriage and land.¹⁴³ *Shuras* and *Jirgas* are longstanding features of Afghan social structures. Traditional dispute resolution mechanisms, especially in rural areas, remain dominant and often to the detriment of women and children's rights.¹⁴⁴ Almost without exception, members of a *Jirga* are all men. Decisions of a *Jirga* are binding and sanctions for non-compliance are harsh, including arson of the trespasser's house, isolation or expulsion from the community and forced removal from the settlement.

A particular issue of concern is the practice of *bad* pursuant to which girls as young as seven years of age are exchanged to settle feuds and murder cases.¹⁴⁵ The inability of the State to intervene in such cases is illustrated in the reply of the Supreme Court to a letter by the Women and Children Legal Research Foundation, an Afghan NGO, enquiring about the Court's policy with regard to *bad*. In explaining its reluctance to intervene in *bad* cases, the Supreme Court writes:

"It would be premature to take action against local traditional practices in provinces where women do not enjoy civil and political rights. The reason is that tradition has replaced the official law of the country in those areas. It will take a long time."¹⁴⁶

F. Military and security infrastructure

1. International Security Assistance Force

The mission of the International Security Assistance Force (ISAF) is to assist the Afghan Government in creating a stable and secure environment for the people of Afghanistan. ISAF was established by UN Security Council Resolution 1386 of 20 December 2001. It is a UN-

justice will be initiated by end-2006 and fully implemented by end-2010; by end-2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney General's Office, the Ministry of the Interior and National Directorate of Security).

d) By end-2010, justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles. See above footnote 27.

¹⁴² For further details on the functioning of these *Jirgas* or *Shuras*, see also International Legal Foundation, *The Customary Laws of Afghanistan*, September 2004, available at [http://theilf.org/Customary Laws.pdf](http://theilf.org/Customary%20Laws.pdf).

¹⁴³ Out of more than 11,000 human rights monitoring interviews conducted by UNHCR and the Afghanistan Independent Human Rights Commission in 2006, 59.1 percent of interviewees who attempted to solve their problems stated they approached customary justice mechanisms, such as elders, *Shura/Jirga*, families and Mullahs, whilst 36.3 percent approached formal justice mechanisms such as Government/local authorities, courts and police. Out of the range of persons/institutions, which interviewees approached to help solve their problems, the Government/local authorities were the main institutions identified as not being able to provide assistance (57.9 percent of interviewees).

¹⁴⁴ Human Rights Council, *Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights*, Human Rights Council, A/HCR/4/98*, 5 March 2007, available at http://ap.ohchr.org/documents/dpage_e.aspx?c=2&su=14 (further: "HRC, *Report of the High Commissioner for Human Rights*").

¹⁴⁵ *Ibid.*

¹⁴⁶ Women and Children Legal Research Foundation, *Bad, a Painful Tranquilliser*, 2004, p. 52. The report does not indicate whether the letter originates from the Supreme Court as a collegial organ, the Chief Justice, or the Court's secretariat.

mandated multinational force rather than a UN peacekeeping force.¹⁴⁷ On 5 October 2006, ISAF assumed responsibility for international stability and security operations throughout Afghanistan, including a number of former coalition forces operating in the eastern part of the country.¹⁴⁸ On 7 February 2007, ISAF force strength was some 35,460 troops, whilst an additional 8,000 remained deployed under United States-led coalition command.¹⁴⁹ Although significant efforts have been made to strengthen the overall security in the country with the support of NATO/ISAF forces, the protection of individual Afghans falls solely within the responsibility of the Afghan National Army and the Afghan National Police.

2. Provincial Reconstruction Teams

In addition to ISAF troops, international and coalition military forces have established so-called Provincial Reconstruction Teams (PRTs). The objectives of the PRTs are to assist the Government of Afghanistan extend its authority, to facilitate the development of a secure environment in the regions, including the establishment of relationships with local authorities, to support security sector reform activities, and the reconstruction effort. The PRTs are managed via five Regional Commands, located in Kabul (central), in Mazar-e Sharif (north), in Herat (west), in Kandahar (south) and in Bagram (east).¹⁵⁰

The PRTs have now been established in 25 locations, namely:

- Kunduz, Meymaneh, Pol-e Khomri, Mazar-e Sharif and Feyzabad (north);
- Herat, Farah, Qaleh-ye Now and Chaghcharan (west);
- Kandahar, Lashkar Gah, Tarin Kowt and Qalat (south); and
- Bagram, Bamyan, Sharan, Ghazni, Gardez, Asadabad, Jalalabad, Panjshir, Mehterlam, Khowst, Nuristan and Wardak (east).¹⁵¹

The PRTs remain an important element of ISAF/NATO strategy. Efforts are ongoing to realign activities of the PRTs with the overall development goals of the Government of Afghanistan. In August 2006, President Karzai endorsed the ISAF concept of Afghan Development Zones in the south. The zones correspond to strategically important geographic locations where improvement of security and governance is a priority for Afghanistan.¹⁵²

3. Afghan National Army

With the adoption of the Presidential Decree on Managing Military Service,¹⁵³ military service in Afghanistan has become voluntary for the first time in the history of the country.

¹⁴⁷ For additional information, see the “International Security Assistance Force”, available at <http://www.jfcbs.nato.int/?tsfsg=dd157622944d699df14d7a77e6feefd0>. See also UN Security Council, *Resolution 1386 (2001)*, S/Res/1386/2001, 20 December 2001, available at <http://www.un.org/Docs/scres/2001/sc2001.htm>.

¹⁴⁸ UN SC, *Report 11 to 16 November 2006*, para 13, see above footnote 24.

¹⁴⁹ UN SC, *Situation in Afghanistan 15 March 2007*, para. 33, see above footnote 34.

¹⁵⁰ US Department of State, Bureau of South and Central Asian Affairs, *Factsheet: Afghanistan Provincial Reconstruction Teams*, 20 February 2007, available at <http://www.state.gov/p/sca/rls/fs/80706.htm>.

¹⁵¹ *Ibid.*

¹⁵² UN SC, *Situation in Afghanistan 15 March 2007*, para. 34, see above footnote 34.

¹⁵³ Decree No. 162 on Managing Military Service, 3 April 2002. A further decree issued in May 2003 states that “the minimum age for recruitment of Afghan citizens to an active military service is limited by the age of 22 to 28”. See Coalition to Stop the Use of Child Soldiers, *Global Report 2004 – Afghanistan*, 2004, available at http://www.child-soldiers.org/document_get.php?id=843.

Established in May 2002, the Afghan National Army (ANA) is projected to grow to 70,000 personnel by 2010. The training of ANA soldiers began at the early stage of the transition. The current assigned strength of the army at Headquarters, in the five regional commands and in logistics, training and administrative structures stands at 32,000. An additional 7,500 are either in training, on sick leave or between assignments. The current estimated “present for duty” strength is approximately 25,000.¹⁵⁴

While manpower and equipment shortfalls, and problems in the payment of salaries continue to present challenges to the full functioning of the ANA, good progress has been noted by the United Nations, in particular in the areas of logistical support, administrative systems and the inherent fabric of the institution. Furthermore, efforts to ensure a more ethnically balanced and effective ANA have been successful.¹⁵⁵ This progress is significant given the ANA’s simultaneous engagement in combat operations in the south of the country.¹⁵⁶

4. Afghan National Police

Efforts to train and deploy Afghan National Police (ANP) forces have intensified, as the need is acute and the existing force lacks training, equipment, and strong command and control structures. An in-depth reform of the existing structure and expansion have been under way and, according to the Ministry of the Interior, as of March 2007, some 61,879 personnel have been assigned to the ANP. The reform of the ANP began with the selection of senior officers and provincial chiefs of police. While the overall exercise was completed without major complications, fourteen individuals (some with links to criminal and illegal armed groups and with a record of human rights violations) were appointed despite failing the selection process.¹⁵⁷ Following concerns expressed by the international community, they were, however, put on probation and, in January 2007, all but three were removed from office. Challenges to creating a more professional police force remain as factors such as low pay, political interference, lack of discipline among officers and rampant corruption continue to plague the ANP’s development.¹⁵⁸

5. Afghan National Auxiliary Police Program

On 16 August 2006, President Karzai announced that locally recruited temporary auxiliary police forces would be established to strengthen Afghanistan’s permanent police force.¹⁵⁹ The overall strategy was to integrate the auxiliary police forces into a unified chain of command and control of the Ministry of Interior. The programme was initiated in six priority insurgency-affected provinces: Farah, Ghazni, Helmand, Kandahar, Uruzgan and Zabul. It was subsequently extended to the provinces of Herat, Kunar, Laghman, Logar, Nangarhar, Nuristan, Paktya and Paktyka. Although the aim was to train and deploy 9,063 auxiliary policemen by 1 May 2007, only 3,212 had been trained, equipped and deployed, by June 2007.

¹⁵⁴ *Ibid.*, paras. 30-31.

¹⁵⁵ *Ibid.*, para. 32.

¹⁵⁶ *Ibid.*

¹⁵⁷ HRC, *Report of the High Commissioner for Human Rights*, para. 64, see above footnote 144.

¹⁵⁸ *Ibid.*

¹⁵⁹ UN Security Council, *Report of the Security Council Mission to Afghanistan, 11 to 16 November 2006*, see above footnote 24.

G. The security situation

The Afghanistan Compact and the ANDS have set a strategic development framework for the protection and promotion of human rights in Afghanistan at the institutional level. However, the lack of security continues to remain the greatest challenge to the enjoyment of human rights and freedoms in Afghanistan.¹⁶⁰

There are broadly three different sources of insecurity in Afghanistan, namely:

- groups ideologically opposed to the Afghan Government such as the *Taliban* and the warlord Gulbuddin Hekmatyar and his *Hezb-e-Islami* faction;
- regional warlords and militia commanders; and
- criminal groups, mostly involved in Afghanistan's booming narcotic trade.¹⁶¹

The lack of security is characterized by various threats to life, physical integrity and overall stability. These threats emanate from the following:¹⁶²

- intensified counterinsurgency activities, including aerial bombings, by ISAF/NATO which have escalated into open warfare in the south, southeast, eastern, western and central provinces and which affect the ability of civilians to travel safely to and from these provinces;
- indiscriminate attacks by anti-Government elements through, *inter alia*, the consistent use of indiscriminate types of warfare (e.g. improvised explosive devices (IED) on the roads, missile attacks, bombs and suicide bomb attacks) including attacks on "soft targets" such as schools, teachers, and religious figures;
- systematic acts of intimidation, involving arbitrary killings, abductions and other threats to life, security and liberty, by anti-Government elements and by regional warlords and militia commanders and criminal groups;
- illegal land occupation and confiscation with limited possibilities for redress; and
- conflicts over religious or tribal differences and strife over the use of pasture land between armed Afghan factions
- inadequate responses to the above by the central Government to address violence and protect civilians.

Such threats have been observed or reported in the past several months,¹⁶³ including, as of November 2007, in a number of areas in the south, southeast, north, northeast, east, west and the central region of Afghanistan.

Insecurity along Kandahar's ring road remains of great concern as insurgent and criminal activities both northward and westward of Kandahar seriously disrupt civilian, commercial and Government movement to and from the capital. The limitations to free movement due to

¹⁶⁰ HRC, *Report of the High Commissioner for Human Rights*, see above footnote 144.

¹⁶¹ Human Rights Watch, *World Report 2007 – Afghanistan*, 11 January 2007, available at <http://hrw.org/wr2k7/pdfs/afghanistan.pdf> (further: "HRW, *World Report 2007*").

¹⁶² Compilation of security updates from the United Nations security system.

¹⁶³ HRC, *Report of the High Commissioner for Human Rights*, see above footnote 144.

insurgent and criminal activities also disrupt humanitarian and development aid as attacks on contractors and implementing partners continue to occur.¹⁶⁴

1. Armed conflict and civilian casualties

In 2007, violence linked with armed conflict was the worst since the fall of the *Taliban* in 2001 and is increasingly affecting civilians. In 2007 indiscriminate insurgency-related attacks were reportedly at least 20 percent higher than in 2006. An average of 548 incidents per month was recorded in 2007 compared to an average of 425 per month in 2006.¹⁶⁵ By the end of September 2007, there have been over 100 suicide attacks compared to 123 in the whole of 2006.¹⁶⁶ While 76 percent of all suicide missions targeted international military and Afghan security forces, their victims were largely civilian bystanders. One hundred and forty-three civilians have lost their lives to suicide attacks alone between 1 January and 31 August 2007.¹⁶⁷ Suicide attacks have been accompanied by targeted attacks committed against schools and students, Government officials, Afghans associated with international military forces and the international aid community, elders, Mullahs and the police.¹⁶⁸ The deadliest attacks targeting civilians by insurgent groups occurred in the south and southeastern regions of Afghanistan.

Fear and insecurity among the civilian population have also been fuelled by the continued distribution of so-called “night letters”, allegedly written by the *Taliban* and containing death threats against Afghans cooperating with the international aid community or military forces.¹⁶⁹

The security situation is further aggravated by heavy fighting between anti-Governmental elements¹⁷⁰ and the ANA/ISAF/NATO forces and the growth of criminal and drug gangs, which enjoy a symbiotic relationship with anti-Government armed groups.¹⁷¹ In 2007, NATO-led counterinsurgency military operations previously focused in the south of Afghanistan have extended to a number of areas in the eastern, southeastern, central and western regions including the provinces of Wardak, Ghazni, Helmand, Urozgan, Kunar, Nuristan, Paktika, Shindand, Bala Murghab and Ghurmach.¹⁷²

Despite the lack of access to conflict-affected areas, a number of specific incidents involving civilian casualties have been reported by the Office of the High Commissioner for Human Rights,¹⁷³ including the alleged killings of civilians in May 2006 during NATO/ISAF air strikes in Kajaki District of Helmand Province. Furthermore, a Government fact-finding mission reported that 10 civilians had been killed and 27 injured in a NATO/ISAF raid on an

¹⁶⁴ Compilation of security updates from the United Nations security system; see also World Food Programme, *Insecurity jeopardizing WFP food aid deliveries in western Afghanistan*, 22 June 2007, available at <http://www.wfp.org/english/?ModuleID=137&Key=2543>.

¹⁶⁵ UN GA, *Situation in Afghanistan 21 September 2007*, para 7, see above footnote 25.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ HRC, *Report of the High Commissioner for Human Rights*, para. 28, see above footnote 144.

¹⁷⁰ The term “anti-Governmental element” is meant to cover a variety of groups, including tribal militias contesting central Government authority, criminal networks, and groups opposed ideologically to the central Government.

¹⁷¹ HRC, *Report of the High Commissioner for Human Rights*, para. 63, see above footnote 144.

¹⁷² Compilation of security updates from the United Nations security system.

¹⁷³ HRC, *Report of the High Commissioner for Human Rights*, paras 27-29 and 33-37, see above footnote 144.

alleged insurgent compound in Dehjawz village, in Uruzgan Province. The report also highlights concerns over the protracted offensive in Zherai/Panjuay districts during which NATO/ISAF allegedly have killed civilians as part of “Operations Medusa.”¹⁷⁴ In December 2006 in Mandozai district, Khost province, five members of a prominent family were killed leading to community demonstrations against international forces.¹⁷⁵

In another reported incident on 4 March 2007, following an attack by a vehicle borne improvised explosive device (VBIED) on a convoy of US Marine Corps Special Forces, US forces retaliated by shooting at vehicles and pedestrians at the immediate site of the VBIED attack and in several different locations along the next 16 kilometres of the road.¹⁷⁶ In total, at least 12 civilians were killed and another 35 injured as a result of the shooting, including several women and children.¹⁷⁷ On the same day, international and national forces initiated air and artillery attacks against a residential compound in Jabar village in Kapisa province. While the attacks were directed at two men accused of insurgent activities, it resulted in the death of nine civilians, including two pregnant women and four small children, and the wounding of five more.¹⁷⁸ In addition, since the end of April 2007, NATO-led forces have been fighting in the Sangin Valley of Helmand province as part of “Operation Achilles”, NATO’s largest operation against the *Taliban* insurgents to date. Air strikes conducted as part of this operation have also caused a number of civilian casualties.¹⁷⁹

While a number of measures have been implemented by the Government and ISAF/NATO forces to address this situation, Human Rights Watch expressed serious concerns about NATO’s ability to distinguish between combatants and civilians due to extensive reliance on aerial bombardment to compensate for insufficient numbers of ground troops.¹⁸⁰

Government sources estimate that armed conflict has caused the displacement of 15,000 families (approximately 80,000 persons) from Uruzgan, Helmand and Kandahar provinces. Furthermore, aerial bombardments in April 2007 in the Zirkoh area of Shindand caused additional displacement of civilians.¹⁸¹ While exact figures of the displacement are unavailable, elders of the area estimate that between 3,000 and 5,000 families were affected.¹⁸² Numbers are likely to increase with the spread of the fighting to other areas. The return of internally displaced persons (IDPs) to their places of origin is hindered by ongoing fighting, intimidation and fear of being killed by *Taliban* insurgents and destruction of homes and livelihoods.

Many programmes are being increasingly affected by armed conflict including road building, airport reconstruction, census exercise, telecommunications, education, health, agriculture

¹⁷⁴ *Ibid*, para. 34.

¹⁷⁵ *Ibid*, para. 36.

¹⁷⁶ Afghanistan Independent Human Rights Commission (AIHRC), *Use of Indiscriminate and excessive force against civilians by US forces following a VBIED attack in Nangarhar province on 4 March 2007*, April 2007, available at <http://www.aihrc.org.af/Investigatoioin.pdf>.

¹⁷⁷ *Ibid*.

¹⁷⁸ Afghanistan Independent Human Rights Commission (AIHRC), *Violations of International Humanitarian Law in Afghanistan: Practices of Concern and Examples of Cases*, April 2007, p. 3, available at http://www.aihrc.org.af/IHL_practices_and_examples_final_Coalition_Vioalatioin.pdf.

¹⁷⁹ BBC, *Air raid ‘kills Afghan civilians’*, 9 May 2007, available at http://news.bbc.co.uk/2/hi/south_asia/6637957.stm.

¹⁸⁰ HRW, *World Report 2007*, see above footnote 161.

¹⁸¹ Reports received by UNHCR from the Ministry of Refugee and Repatriation.

¹⁸² UNAMA, *Justice Sector Review*, see above footnote 127.

and the National Solidarity Program, a flagship programme of community-level democratization and development.¹⁸³ The right to education has been undermined particularly in districts of Hilmand, Kandahar, Zabul, Uruzgan, Paktika, parts of Ghazni, Khost, Paktia and Kunar as attacks have caused the closure of schools and driven out teachers and NGOs providing education. Over 200 schools were burnt, attacked or partially destroyed and 200,000 students were affected by school closure throughout the country.¹⁸⁴ These attacks were characterized by Human Rights Watch as constituting war crimes on the basis of defying the law of armed conflict by targeting civilians and civilians' establishments.¹⁸⁵

2. Disarmament of illegal armed groups

The disarmament, demobilization and reintegration (DDR) process of the Afghan Militia Forces (AMF) was completed on June 2006. This process included the safe removal and cantonment of over 10,880 heavy weapons.¹⁸⁶ Cities such as Gardez, Mazar-e Sharif and Bamyan are now largely free of operational heavy weapons. The cantonment of these weapons, coupled with the demobilization of Afghan militia forces, has reduced opportunities for factions to engage in clashes of the scope and intensity that affected the Northern provinces in the period 2002-2004, and the Western provinces in 2006.¹⁸⁷

In July 2004, through Presidential Decree No. 50, the remnants of the AMF and armed groups, not part of the AMF, were declared illegal.¹⁸⁸ It was estimated that there could be up to 120,000 persons operating in over 1,800 illegal armed groups. By targeting these groups, the disbandment of illegal armed groups (DIAG) aims to contribute to the re-establishment of the rule of law through the promotion of good governance.¹⁸⁹

However, the disarmament of illegal armed groups is very much incomplete. Piloted during the run-up to the parliamentary and provincial council elections in 2005, its main phase was launched between 1 May and 7 June 2006. From September 2006 to 25 February 2007, only 4,496 light and heavy weapons had been submitted. By the end of 2006, illegal armed groups in just three districts of the five-targeted provinces were deemed by the Disbandment Joint Secretariat (the body overseeing the DIAG programme) to have complied with the programme's objectives.¹⁹⁰ The pace of weapons submission and overall disbandment compliance, particularly in the north, was thought to have suffered from the overall deterioration of the security situation.¹⁹¹ In response to stalled implementation, a joint review of the disarmament programme was undertaken by key stakeholders. The recommendations of the review were reflected into an action plan, which President Karzai endorsed on 7 February 2007. The plan attempts to put new impetus in the disarmament process in part by

¹⁸³ International Crisis Group (ICG), *Afghanistan's Endangered Compact*, Asia Briefings No. 59, 29 January 2007, p. 8, available at <http://www.crisisgroup.org/home/index.cfm?l=1&id=4631>.

¹⁸⁴ HRC, *Report of the High Commissioner for Human Rights*, para. 31, see above footnote 144.

¹⁸⁵ HRW, *World Report 2007*, see above footnote 161.

¹⁸⁶ UN Security Council, *The Situation in Afghanistan and Its Implications for Peace and Security*, A/61/326-S/2006/727, 11 September 2006, paras. 25-30, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453785780> (further: "UN SC, *Situation in Afghanistan 11 September 2006*").

¹⁸⁷ *Ibid.*

¹⁸⁸ Presidential Decree No. 50 on Disarmament, Demobilization and Reintegration of Afghan Militia Forces, 14 July 2004, available at <http://www.diag.gov.af/decree.htm>.

¹⁸⁹ Disbandment of Illegal Armed Groups, *Strategy for Disbandment of Illegal Armed Groups in Afghanistan (DIAG)*, 26 January 2006, available at <http://www.diag.gov.af/DIAG Strategy 2006-01-26.pdf>.

¹⁹⁰ UN SC, *Situation in Afghanistan 15 March 2007*, para. 23, see above footnote 34.

¹⁹¹ *Ibid.*

giving the national security adviser a ministerial coordination and reporting role and the Ministry of the Interior the lead role in the implementation of the disarmament programme.

3. Mines and unexploded ordnances

The Afghanistan Compact sets benchmarks for the clearance of areas contaminated by land mines. It indicates that by the end of 2010, in line with Afghanistan's Ottawa Convention¹⁹² obligations, the land area contaminated by mines and unexploded ordnances will be reduced by 70 percent; all stockpiled anti-personnel mines will be located and destroyed by end-2007; and by end-2010, all unsafe, unserviceable and surplus ammunition will be destroyed.¹⁹³

Despite continued progress made by the Mine Action Programme for Afghanistan (MAPA) and its partners over the past decade, Afghanistan continues to be one of the most severely mine contaminated countries in the world. The land mine impact survey,¹⁹⁴ completed in January 2005, reported 2,245 casualties in the two years before the survey, i.e. 922 people killed and 1,323 injured. It identified 2,368 landmine and Unexploded Ordnance (UXO)-impacted communities in 259 districts and found 4.2 million persons (about 15 percent of the population) affected by mines and UXO, including 1.6 million persons living in the high or medium-impact communities. It also confirmed the existence of 4,514 suspected hazardous areas (SHAs), 715 square kilometres, of which 281 (12 percent) were high-impact, 480 (20 percent) medium-impact and 1,607 (61 percent) low-impact. While the survey found that all but two provinces (Uruzgan and Daykundi) were mine-affected, 75 percent of SHAs, and the same proportion of recent casualties, were located in twelve provinces; half the SHAs were located in just six provinces, led by Kabul. In addition, 45 percent of the recent casualties recorded by the survey were in the provinces of Kabul, Parwan and Takhar. The survey reported that of 4,514 SHAs in Afghanistan, only ten were fenced and 542 had warning signs. A total of 3,962 SHAs (87 percent) were not marked or fenced.

In 2007, mines continued to cause casualties. By 15 June 2007, the UN Mine Action Centre for Afghanistan (UNMACA) recorded 194 new mine/UXO casualties, including 32 killed and 162 injured. Anti-personnel mines caused 41 casualties; anti-vehicle mines, 17; cluster munitions, 4; other UXO, 108; and the remainder unknown.¹⁹⁵

H. The human rights situation

1. The national and international legal framework

Article 7 of the Constitution reiterates Afghanistan's commitment to abide by the United Nations Charter, international treaties and conventions to which it is party, and the Universal Declaration of Human Rights.

¹⁹² Afghanistan ratified the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, on 11 September 2002. The full text of the Convention is available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/8DF9CC31A4CA8B32C12571C7002E3F3E/\\$file/APLC+English.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/8DF9CC31A4CA8B32C12571C7002E3F3E/$file/APLC+English.pdf).

¹⁹³ Afghanistan Compact, see above footnote 27.

¹⁹⁴ Islamic Republic of Afghanistan, Survey Action Centre, *Landmine Impact Survey*, 28 August 2005, available at http://www.sac-na.org/pdf_text/afghanistan/AFG_ExecSummary_Engl.pdf.

¹⁹⁵ Landmine Monitor, *Landmine Monitor Report 2007*, available at <http://www.icbl.org/lm/2007/afghanistan.html>.

The protection of human rights and the principle of equality (non-discrimination) is reinforced in Article 6 of the Constitution, which calls for the creation of “*a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity and equality between all peoples and tribes and balanced development of all areas of the country*”.

Afghanistan is a party to six of the seven major international human rights instruments, namely:

- International Covenant on Economic, Social and Cultural Rights;¹⁹⁶
- International Covenant on Civil and Political Rights;¹⁹⁷
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁹⁸
- International Convention on the Elimination of All Forms of Racial Discrimination;¹⁹⁹
- Convention on the Rights of the Child²⁰⁰ and its two optional protocols (Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography²⁰¹ and Optional Protocol on the Involvement of Children in Armed Conflict);²⁰² and
- Convention on the Elimination of All Forms of Discriminations Against Women.²⁰³

¹⁹⁶ The International Covenant on Economic, Social and Cultural Rights (ICESCR) was ratified by Afghanistan in April 1983. The ICESCR is available at <http://www2.ohchr.org/english/law/cescr.htm>.

¹⁹⁷ The International Covenant on Civil and Political Rights (ICCPR) was ratified by Afghanistan in April 1983. Afghanistan is party neither to the First Optional Protocol to the Covenant, which gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol nor to the Second Optional Protocol to the Covenant on the abolition of the death penalty. The ICCPR is available at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁹⁸ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (CAT) was ratified by Afghanistan in June 1987. Afghanistan is not party to the Optional Protocol to the Convention, adopted on 18 December 2002 by the General Assembly, whose objective is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. See the CAT is available at <http://www2.ohchr.org/english/law/cat.htm>.

¹⁹⁹ The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was ratified by Afghanistan in August 1987. Afghanistan has recognized the competence of the Committee on the Elimination of Racial Discrimination to receive and examine individual complaints of violations which fall under the provisions of CERD. The CERD is available at <http://www2.ohchr.org/english/law/cerd.htm>.

²⁰⁰ The Convention on the Rights of the Child (CRC) was ratified in April 1994. The CRC is available at <http://www2.ohchr.org/english/law/crc.htm>.

²⁰¹ The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC) was ratified by Afghanistan in October 2002. The OP-CRC-SC is available at <http://www2.ohchr.org/english/law/crc-sale.htm>.

²⁰² The Optional Protocol on the Involvement of Children in Armed Conflict (OP-CRC-AC) was ratified by Afghanistan in September 2003. General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force 12 February 2002. The OP-CRC-AC is available at <http://www2.ohchr.org/english/law/crc-conflict.htm>.

²⁰³ The Convention on the Elimination of All Forms of Discriminations against Women (CEDAW) was ratified by Afghanistan in April 2003. Afghanistan is not party to the Optional Protocol to the Convention, adopted by the General Assembly on 6 October 1999. By ratifying the Optional Protocol, a State recognizes the competence of the Committee on the Elimination of Discrimination against Women – the body that monitors States parties’ compliance with the Convention – to receive and consider complaints from individuals or groups within its jurisdiction. The CEDAW is available at <http://www2.ohchr.org/english/law/cedaw.htm>.

Afghanistan has also ratified the four Geneva Conventions,²⁰⁴ the Rome Statute of the International Criminal Court,²⁰⁵ and both the Convention relating to the Status of Refugees and its 1967 Protocol.²⁰⁶

2. Freedom of expression

Both the Constitution and the Media Law of August 2005 guarantee the inviolability of freedom of expression, and the right to print and publish without prior submission to State authorities.²⁰⁷ This is a positive development since the previous Press Law²⁰⁸ was not comprehensive and contained 37 crimes, which could potentially be used to limit freedom of expression for journalists, such as provisions prohibiting reporting on subjects that may offend Islam, dishonour the people or weaken Afghanistan's army.²⁰⁹

The Media Law, approved by Presidential Decree in 2005, was endorsed by the *Wolesi Jirga* at the end of May 2007. The endorsement follows an intense public debate caused by the attempt on the side of the Parliament to bring the state-owned Radio Television of Afghanistan under Government control and private media content to more intense scrutiny and Government control.²¹⁰ The law is still to be reviewed by the *Meshrano Jirga* before receiving Presidential assent.²¹¹

Curbs on the media with regard to freedom of expression continued to be reported in 2006 and 2007.²¹² The head of the state-owned Radio and TV Afghanistan resigned citing pressure from the Minister of Culture and Information to modify broadcasts in favour of Government public information stories. In June 2006, Afghanistan's intelligence agency, the National Directorate of Security (NDS), issued a directive banning material which may be construed as being against national security interests and/or the presence of international security forces.²¹³ The directive was strongly criticized by Human Rights Watch and, following protests,²¹⁴ was withdrawn. In another incident in April 2007, Afghanistan's Attorney

²⁰⁴ The four Geneva Conventions were ratified in September 1956. Afghanistan is not party to the two Additional Protocols. The Geneva Conventions and the Additional Protocols are available at <http://www.cicr.org/ihl.nsf/CONVPRES?OpenView>.

²⁰⁵ The Rome Statute of the International Criminal Court (ICC Statute) was ratified in February 2003. The ICC Statute is available at <http://www2.ohchr.org/english/law/criminalcourt.htm>.

²⁰⁶ The Convention relating to the Status of Refugees and its 1967 Protocol were ratified in August 2005. The 1951 Convention and the Protocol are available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3be01b964>.

²⁰⁷ Article 34 of the Constitution, see above footnote 10. The Law on Mass Media is available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d63b2b4>.

²⁰⁸ The Press Law was adopted in February 2002 and is available at <http://www.idlo.int/AfghanLaws/2002-2003.htm>.

²⁰⁹ UNESCO, *Afghanistan Press Law Criticised*, 4 September 2002, available at http://portal.unesco.org/ci/ev.php?URL_ID=3979&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1093342661.

²¹⁰ UN SC, *Situation in Afghanistan 15 March 2007*, para. 40, see above footnote 34.

²¹¹ For additional information on the Media Law please see, BBC, *Afghan media pin hopes on new law*, 5 June 2007, available at http://news.bbc.co.uk/1/hi/world/south_asia/6718899.stm.

²¹² HRC, *Report of the High Commissioner for Human Rights*, paras. 46-52, see above footnote 144.

²¹³ *Ibid.*

²¹⁴ Human Rights Watch, *Afghanistan: remove new restriction on the media*, 22 June 2006, available at <http://hrw.org/english/docs/2006/06/21/afghan13605.htm>.

General raided Tolo Television, one of the country's most popular stations, on account of alleged misrepresentation of facts in a news item.²¹⁵

In addition to pressure on journalists by the authorities, a number of violent incidents involving the media have taken place in 2006 and 2007. In May 2006, Ariana TV was attacked in Kabul by violent demonstrators and two German journalists were murdered in Baghlan Province in October 2006.²¹⁶ Furthermore, independent journalists are increasingly accused of cooperating with Afghan or foreign intelligence services officials and thus targeted by anti-government forces. An example is the kidnapping of a foreign and an Afghan journalist in March 2007 in the southern province of Helmand. They were initially accused of spying on behalf of international forces. The incidents resulted in the beheading of the Afghan journalist and the liberation of the foreign journalist in exchange for the release of Taliban prisoners.²¹⁷

3. Freedom of religion

Reliable data on religious demography is not available. However, observers estimate that 80 percent of the Afghan population is Sunni Muslim, 19 percent Shi'a Muslim and other religious groups make up less than one percent of the population. There is a small hidden Christian community,²¹⁸ a small Sikh and Hindu community²¹⁹ and approximately 400 Afghans followers of the Baha'i faith predominantly based in Kabul.

Although the Constitution declares Islam to be the religion of the State and affirms that "*no law can be contrary to the beliefs and provisions of the sacred religion of Islam*",²²⁰ it also states that "*followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of the law*".²²¹

The Constitution defers to Sharia law for issues on which the Constitution or the Penal Code are silent (such as conversion and blasphemy). As such, conversion from Islam is considered apostasy and is, under some interpretations of Sharia law, punishable by death.

The imprisonment of Abdul Rahman²²² reflects concerns regarding the tensions between Sharia and statutory laws, the capacity of the judiciary, the role of clerics in the judiciary and the application of the death penalty. He was imprisoned in March 2006 for converting from Islam to Christianity and threatened with a death sentence. Abdul Rahman was later released on findings of mental instability and granted asylum in Italy. Conservative religious clerics

²¹⁵ Reuters, *Afghan Government raids TV station over news clip*, 18 April 2007, available at <http://www.reuters.com/article/latestCrisis/idUSSP284319>.

²¹⁶ HRC, *Report of the High Commissioner for Human Rights*, para. 48, see above footnote 144.

²¹⁷ *Ibid.*

²¹⁸ Estimates range between 500 and 8000 individuals. See US Department of State, Bureau of Democracy, Human Rights, and Labor, *International Religious Freedom Report 2007: Afghanistan*, 14 September 2007, available at <http://www.state.gov/g/drl/rls/irf/2007/90225.htm> (further: "US, *Religious Freedom Report 2007*").

²¹⁹ *Ibid.* It is estimated that 3000 Sikhs and Hindu believers live in Afghanistan.

²²⁰ Article 3 of the Constitution, see above footnote 10.

²²¹ Article 2 of the Constitution, see above footnote 10.

²²² An Afghan born Muslim who converted to Christianity while abroad, and later accused and imprisoned in March 2006 on charges of conversion from Islam to Christianity and threatened with a death sentence. For further information, see M. Knust, *The case of an Afghan apostate – The Right to a fair Trial between Islamic law and Human Rights in the Afghan Constitution*, Max Planck UNYB, Vol. 10, 2006 (further: "M. Knust").

organized a demonstration of over 700 protestors in Mazar-e-Sharif calling for Rahman's death and denouncing international involvement in the case.²²³

According to a report of the UN Secretary-General, following the highly publicized case of Abdul Rahman, there have been three similar cases of harassment of Afghan Christians. In two of the cases, Afghan families in which some of the members had converted to Christianity reported being harassed by their community and eventually decided to leave the country. In a third case, a Christian convert was jailed on unrelated allegations of homicide. While in jail, another inmate who came to know of his religious belief reportedly killed him.²²⁴

Although not strictly forbidden by the Constitution or other laws, proselytism is viewed by the authorities and society in general as contrary to the tenets of Islam. As such, it is practised discreetly.²²⁵ In August 2006, 1,000 members of a South Korean Christian aid group were deported from Afghanistan after Islamic clerics accused them of trying to convert Muslims to Christianity.²²⁶

Members of the Hindu and Sikh communities report being discriminated against when seeking jobs with the local and national Government. Furthermore, Sikh and Hindu children were reportedly unable to attend schools due to harassment from teachers and students. The Government took limited steps to protect these children, such as opening the first-ever Government-sponsored school for Sikh and Hindu children in Ghazni.²²⁷ Although allowed to practise their faith publicly, Sikh and Hindu communities continue to face problems obtaining land for cremation.²²⁸

In May 2007, the Supreme Court issued a ruling on the status of the Baha'i faith declaring it to be distinct from Islam and a form of blasphemy. The ruling also declared all Muslims who converted to Baha'i to be apostates and all followers of the Baha'i faith to be infidels. Hence, Afghan citizens who convert from Baha'i to Islam will face a risk of persecution similar to that of Christians converts.²²⁹ Furthermore, in a separate incident earlier this year, police

²²³ US, *Religious Freedom Report 2007*, see above footnote 218. For additional reports regarding the public reaction to Abdul Rahman's release and subsequent grant of asylum, see J. MacKenzie and W. Amani, *Can Islam and Democracy Coexist in Afghanistan?*, Institute for War and Peace Reporting, Afghan Recovery Report, 29 March 2006, available at http://www.iwpr.net/?p=arr&s=f&o=260618&apc_state=henparr. See also: T. Albone, *Anger over Christian convert in Kabul who faces death*, Times Online, 21 March 2006, available at <http://www.timesonline.co.uk/tol/news/world/article743381.ece>; and I. Fisher and E. Povoledo, *Italy Grants Asylum to Afghan Christian Convert*, The New York Times, 30 March 2006, available at <http://www.nytimes.com/2006/03/30/international/asia/30afghan.html>.

²²⁴ UN SC, *Situation in Afghanistan 11 September 2006*, para. 45, see above footnote 186; see also US, *Religious Freedom Report 2007*, see above footnote 218.

²²⁵ US, *Religious Freedom Report 2007*, see above footnote 218.

²²⁶ *Ibid.* See also BBC, *Kabul to deport Korean Christians*, 3 August 2006, available at http://news.bbc.co.uk/2/hi/south_asia/5243448.stm; and R. Synovitz, *Kabul Cancels Christian Group's Event, Expels Organizers*, Radio Free Europe/Radio Liberty, 4 August 2006, available at <http://www.rferl.org/featuresarticle/2006/08/f8a9e931-ebb3-4843-9e62-53c83c3db93f.html>.

²²⁷ US, *Religious Freedom Report 2007*, see above footnote 218.

²²⁸ *Ibid.* See also The Hindu, *Sikhs seek cremation grounds in Afghanistan*, 19 September 2007, available at <http://www.hindu.com/2007/09/19/stories/2007091961651500.htm>; P. Chauhan, *Life is hellish for Afghan Sikhs*, The Tribune, 27 September 2007, available at <http://www.tribuneindia.com/2007/20070928/main5.htm>; The Tribune, *Angry Afghan Sikhs take coffin to UN HQ: Say Muslims opposing cremation*, 17 September 2007, available at <http://www.tribuneindia.com/2007/20070918/world.htm#3>.

²²⁹ US, *Religious Freedom Report 2007*, see above footnote 218.

arrested an Afghan member of the Baha'i faith after his wife (a Moslem, so the marriage was prohibited) exposed his religious beliefs to the authorities. The man spent 31 days in jail without a charge, but was eventually released, following pressure from the international community, and reportedly fled to another country.²³⁰

In August 2006, the Afghan Government announced its intention to re-establish, under the supervision of the Ministry of Religious Affairs, the Department for the Prevention of Vice and the Promotion of Virtue, infamous under the *Taliban*, for its violations of women's and religious minorities' right.²³¹ Thus far, its establishment has been successfully blocked by progressive members of the Government and civil society.²³²

4. The situation of women and girls

Over the past five years, the Government of Afghanistan and the international community have placed initiatives promoting gender equality high on their agenda. The Ministry of Women's Affairs was created immediately after the demise of the *Taliban* and Afghanistan ratified the UN Convention on the Elimination of All Forms of Discrimination against Women in 2003.

The Constitution of Afghanistan sets forth equal rights and duties before the law.²³³ Pursuant to Article 44, the State has the responsibility to "*devise and implement effective programmes for balancing and promoting education for women*". A National Action Plan for Women in Afghanistan was launched in 2005 setting out goals to be implemented by 2010. It focuses on identified priority areas for the promotion of gender equity, i.e. health, education, legal protection and economic empowerment. The latter was reaffirmed in the Afghanistan Compact, which foresees its full implementation by the end of 2010 and which is expected to be passed by Parliament in 2007. In addition, gender equality and women's rights are recognized as critical issues in the ANDS. As a result of the attention to gender equality, including affirmative action in some areas, female participation in Parliament and the public sector has increased and women's organizations are growing in membership and presence in urban areas.²³⁴

Various mechanisms, such as women's focal points, gender units, women's *shuras* and women's departments have been created in ministries to facilitate the incorporation of gender priorities into their work, and serve as vehicles for raising and discussing women's concerns at the policy level. Inter-ministerial and inter-agency bodies that initiate, coordinate, and monitor gender equality measures are also operational, such as the Inter-Ministerial Commission for the Elimination of Violence against Women (CEVAW), Inter-Ministerial Working Group on Gender and Statistics (IWGGS), and NGO Coordination Council. To implement the Afghanistan Compact and the ANDS benchmarks on gender, the ANDS

²³⁰ *Ibid.*

²³¹ *Ibid.* See also Human Rights Watch, *Afghanistan: Vice and Virtue Department Could Return*, 18 July 2006, available at <http://hrw.org/english/docs/2006/07/18/afghan13759.htm>; C. Lamb, 'Ministry of vice' fills Afghan women with fear, *Times Online*, 23 July 2006, available at <http://www.timesonline.co.uk/tol/news/world/article691340.ece>; and T. Coghlan, *Fury as Karzai plans return of Taliban's religious police*, *The Independent*, 17 July 2006, available at <http://news.independent.co.uk/world/asia/article1181612.ece>.

²³² HRC, *Report of the High Commissioner for Human Rights*, para. 51, see above footnote 144.

²³³ Article 22 of the Constitution, see above footnote 10.

²³⁴ HRC, *Report of the High Commissioner for Human Rights*, para. 13, see above footnote 144.

created the Consulting Working Group on Gender (CG2), Cross-Cutting Consulting Group (CCCCG) on Gender, Technical Advisory Group for Women and Children (TAG) as sub-working groups within the legal reform working group and Sub-Working Group on Vulnerable Women, all of which have been instrumental in keeping gender high on the agenda of macro development processes.

Through these initiatives, there have been measurable improvements on women's participation in public life over the past five years. Women now represent 27 percent of the National Assembly and hold one sixth of the seats in the Upper House, ranking Afghanistan twentieth among countries with the highest representation of women in the legislature. A great number of women and girls have returned to schools and Government ministries have started to address many of their obstacles, including violence against women.²³⁵

Progress in the realization of gender equality remains, however, an uphill struggle as legal and social discrimination are deep-rooted, insecurity grows, and customary practices prevail. Afghan women and girls continue to suffer extremely low social, economic and political status. Chronically poor women are one of the most vulnerable groups in Afghanistan. Due to the culture and tradition, some means of social intervention (e.g. training, education, etc.) to support vulnerable women prove to be very difficult. Despite tremendous progress, the gender gap remains high. Only 12.6 percent of female adults are literate²³⁶ and a very small percentage of them is employed.²³⁷ Afghan women rank among the world's worst off group by significant human development indicators: life expectancy is 42 years; maternal mortality as high as 1,600 deaths per 100,000 births; and literacy is as low as 14 percent for women 15 and older.²³⁸ While the number of girls in school increased quickly after the fall of the *Taliban* in 2001, only 37 percent of school-age girls were in school in 2006,²³⁹ as the violence directed at schools in 2005 and 2006 affected school attendance by girls particularly hard.

A majority of women is banned from working outside of their homes by their male family members, tribal and religious leaders. The freedom of movement of women is severely limited, especially in rural areas. In most villages, women are restricted to family compounds except for necessary transit to water points. In some rural areas, tribal culture provides women with marginally greater freedom to circulate, for example to work in the fields. In urban areas, freedom of movement is less restricted, but normally requires a male escort (*mahram*). Single women of marriageable age rarely move alone because they risk exposure to harassment and abduction for marriage.²⁴⁰

The practice of child marriages and threat of forced marriages is at the root of most violence that takes place in the household.²⁴¹ The Afghanistan Independent Human Rights Commission (AIHRC) estimates that between 60 and 80 percent of all marriages in

²³⁵ Afghanistan National Development Strategy, *Draft Gender Equity Cross Cutting Strategy, 2008-2013*, Revised as of 9 October 2007.

²³⁶ UNDP, *Afghanistan Human Development Report 2007*, available at <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/nhdr2007.pdf>.

²³⁷ Afghanistan National Development Strategy, *Initial Draft Social Protection including Humanitarian Assistance, 2008 – 2013*, October 16, 2007.

²³⁸ HRC, *Report of the High Commissioner for Human Rights*, para. 6, see above footnote 144.

²³⁹ *Ibid*, para. 8.

²⁴⁰ *Ibid*, paras. 18-23.

²⁴¹ *Ibid*.

Afghanistan are forced marriages and approximately 57 percent of girls are married before the age of 16.²⁴² Afghan culture is characterized by a strong patriarchal system in which the family is central. The social system is extremely gender stratified. The marriages of both men and women are almost always arranged by their families. Such unions commonly take place between relatives, and within communities and clans. Neither men nor women are expected to resist the will of their family regarding their marriage partners. Even highly educated women who work for international NGOs report that they are unable to affect their family's choice of husband or timing of marriage.²⁴³ Exchange marriages are commonly used for payments of debts or resolution of dispute. This practice may involve giving a daughter in marriage in exchange for another young girl from the bridegroom's family to marry the bride's brother or sometimes her father. As such, girls and women become commodities, being sold for money, obligation or honor.²⁴⁴ Additionally, it is common practice in Afghanistan for a widow to marry a family member of the late husband, even against her expressed will. Where a widow does not remarry, her husband's family takes on the decision-making role in relation to her family. Although often deemed a burden, the late husband's family maintains a strong sense of 'ownership' of the widow's sons.²⁴⁵ Women remain deprived of basic civil rights, including in cases of divorce, custody and with regard to inheritance rights.²⁴⁶

Under Afghan law, the legal minimum age for marriage is 15 years old.²⁴⁷ In addition to being the cause of subsequent physical and psychological violence, the practice of forced and early marriage in itself constitutes a serious form of violence against women. Child marriages prevent girls from getting an education or any opportunity for independent work. It subjects them to pregnancy and childbirth before they have reached physical maturity, a circumstance that often produces serious physical trauma, psychological harm, and sometimes lifelong physical and/or emotional disabilities.²⁴⁸ Relevant laws are not enforced, nor perpetrators punished.²⁴⁹ Since only five percent of marriages are registered, these unlawful acts remain outside the formal and legal domains.²⁵⁰

In addition to forced and early marriage, domestic violence, sexual harassment and rape, trafficking of women and children, and honour killings are some of the most egregious types of violence perpetrated against women in Afghanistan. The majority of women both in rural and urban areas are faced with domestic violence. Research conducted by AIHRC on domestic violence shows that more than 50 percent of women, in addition to suffering from other types of violence, have been beaten. Domestic violence not only has serious physical and psychological effects on women, but also causes other serious problems such as self-immolation, suicide, escape from the family, forced prostitution and addiction to narcotics. Statistics compiled by the Commission indicate that from 22 August to 30 December 2005, 462 women resorted to narcotics due to domestic violence. According to evaluations by AIHRC, self-immolation and killing of women in the western and southeast areas of

²⁴² *Ibid*, para. 8.

²⁴³ S. Bahgam and W. Mukhatari, *Study on Child marriage in Afghanistan*, Medica Mondiale, May 2004, available at: http://www.medicamondiale.org/download/doku_report/mm_Child_marriage_report_2004_e.pdf.

²⁴⁴ HRC, *Report of the High Commissioner for Human Rights*, see above footnote 144.

²⁴⁵ *Ibid*.

²⁴⁶ Human Rights Watch, *Hope and Fear: Intimidation and Attacks against Women in Public Life in Afghanistan*, October 2004, available at <http://hrw.org/backgrounder/asia/afghanistan1004/>.

²⁴⁷ Article 71 of the Constitution, see above footnote 10.

²⁴⁸ HRC, *Report of the High Commissioner for Human Rights*, see above footnote 144.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid*.

Afghanistan are the nation's highest, with 150 cases of self-immolation identified in the western area and 34 such cases identified in the southeast area. Escape from home, which is another issue caused by domestic violence and family restrictions against women, is mostly witnessed in south and southeast areas. In 2006, 200 such cases from Kandahar, 17 cases from the southeast, and 12 cases from the east of the country were reported. During 2005, the Commission identified 197 cases of suicide attempts in Herat out of which 69 cases ended in death. Similarly, 35 of such cases were reported from Kandahar province. Evaluations by the Commission show that most of these cases are caused by domestic violence against women. In most of the provinces, domestic violence may result in forcing women into prostitution. The Commission's office in the eastern zone has identified six cases of women trafficking and 20 cases of women traded for narcotics in Helmand province alone during 2006. Similar cases occur in most parts of Afghanistan. Furthermore, non-awareness and difficulty for women and girls in accessing their legal rights provide a conducive environment for polygamy and domestic violence against women.²⁵¹

Self-immolation continues to represent the most desperate measure used by Afghan women to put an end to situations of extreme violence. The current trends in violence against women in Afghanistan cannot be solely reduced to culture and tradition without consideration of the conflict and post-conflict situation.²⁵² Four factors underlie women's vulnerability and the perpetuation of violence today: (1) the traditional patriarchal gender order; (2) the erosion of protective social mechanisms; (3) the lack of the rule of law; and (4) the poverty and insecurity in the country.²⁵³

Women's ability to protect themselves is also affected by their limited participation in the social, economic and political spheres, by an overall lack of awareness regarding women's rights, by traditional values, and *de jure* and *de facto* discrimination. The latter is further aggravated by ongoing conflict in parts of the country.²⁵⁴ Women active in civil or political spheres brave violence and intimidation, including death threats.²⁵⁵

Despite not having access to all parts of the country, AIHRC registered 1,545 cases of violence against women from January to November 2006, including self-immolation, exchange of girls in the context of dispute settlement, forced marriages and sexual violence. With 200 complaints, forced marriage was the largest category.²⁵⁶ The Ministry of Women's Affairs recorded more than 500 cases of violence against women, including 197 cases of self-immolation in Herat Province alone.²⁵⁷ In almost all cases of domestic violence the perpetrators were male family members. Underreporting is common, as most women do not report violence, particularly domestic violence, due to fear of reprisals, lack of systematic

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ UNIFEM Afghanistan, *Elimination of Violence against Women Special Fund – First Call for Proposals*, 15 November 2007, available at http://afghanistan.unifem.org/media/press/2007/EVAW_specialfund_071001.html.

²⁵⁵ Safia Amajan, a prominent educator, women's rights activist, and Government official was assassinated in Kandahar in September 2006. Malalai Joya, a Member of Parliament from Farah, was physically attacked in the *Wolesi Jirga* and threatened with death when she criticized Members of Parliament notorious for past and current human rights abuses.

²⁵⁶ HRC, *Report of the High Commissioner for Human Rights*, para. 19, see above footnote 144.

²⁵⁷ Afghanistan Independent Human Rights Commission, *Evaluation Report on General Situation of Women in Afghanistan*, 8 March 2006, available at http://www.aihrc.org.af/rep_eng_wom_situation_8_march.htm.

support and services for victims of violence, failure to prosecute perpetrators and intolerance on the part of the community.²⁵⁸

A number of activities have been initiated to establish protection and response mechanisms for women at risk.²⁵⁹ A family response unit was established in District 10 Kabul police station in 2005 to enable women victims of domestic violence and other criminal offences access to the police. A similar unit also exists in Herat and three were opened in Mazar-e-Sharif. Safe houses for women at risk, offering temporary protection and access to services, currently exist in Kabul, Herat and Mazar-e-Sharif. Other activities include psychosocial, paralegal, legal and medical assistance services. Apart from these very limited services in the abovementioned locations, very little in terms of protection mechanisms exist in other urban centres and rural communities for women at risk or survivors of violence. Although slowly increasing, capacity to address situations of violence continues to remain very limited in Afghanistan, in particular with regard to psychosocial support and legal representation, including access to defence lawyers. The identification of durable solutions for women who have sought refuge in safe houses continues to be very challenging. While innovative approaches are increasingly being adopted by social workers, reunification with extended family members remains the most common solution, at times resulting in renewed forms of violence. For a significant number of women, family reunification is not an option and many continue to reside in quasi-detention in safe houses with no solutions in sight, for years on end.

5. Access to justice

In Afghanistan, the vast majority of defendants in criminal cases do not have legal representation. Detainees are routinely held for months without charge or appearances before a judge, and rarely receive legal representation. While access to legal aid has improved in major urban centres, the number of practicing lawyers remains extremely limited. In October 2006, only 223 lawyers countrywide were registered and licensed with the Ministry of Justice. The legal aid department of the Supreme Court comprises only 19 lawyers, despite the fact that both the Constitution and the Interim Criminal Procedure Code provide for free legal representation for indigent defendants in criminal cases. The establishment of an independent bar association is currently being promoted in an effort to raise professional standards and offer admission courses and programmes for continuing education. A draft law to regulate the legal profession is also being discussed.

A recent report of the Office of the High Commissioner for Human Rights indicates that throughout Afghanistan the judicial system is failing to protect and provide justice to women.²⁶⁰ Women and girls are arrested and imprisoned for committing moral and uncodified crimes, including for perceived misbehaviour such as running away from home.²⁶¹ Women are also arbitrarily detained and/or convicted of adultery when reporting crimes of a sexual nature, denied a fair trial and judicial guarantees. Women are often returned to male offenders when reporting violence.²⁶² Sentencing by judges of females convicted of sexual

²⁵⁸ HRC, *Report of the High Commissioner for Human Rights*, para. 19, see above footnote 144.

²⁵⁹ UNHCR/UNIFEM, *Moving towards an integrated strategy for Afghanistan: Progress Note on Protection Responses to Women-at-risk*, July 2006.

²⁶⁰ HRC, *Report of the High Commissioner for Human Rights*, paras 14-17 and 21, see above footnote 144.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

offences such as adultery is often disproportionately harsh as opposed to male offenders who often are released or enjoy much lighter sentences.²⁶³

6. Detention

There are prisons in 34 provinces of Afghanistan administered by the Ministry of Justice. Prison conditions in most facilities remain below minimum international standards.²⁶⁴ There are reports of over-capacity in the country's prisons including an urgent lack of accommodation for over 1,000 detainees in 112 provincial prisons, which is yet to be addressed. In January 2007, the central prison's department announced that it had completed the past fiscal year with a large deficit and that most staff in the provinces had not been paid salaries in four months. The absence of a strong independent bar association and a state funded legal aid acts as a significant impediment to safeguarding the rights of accused persons and to providing the necessary legal representation to those unable to obtain legal assistance privately.²⁶⁵ The illegal detention of individuals, particularly women and children, continues to raise serious human rights concerns.²⁶⁶

The implementation of the 2004 Interim Criminal Procedure Code has reportedly been highly problematic.²⁶⁷ Although a number of extensive training programmes for judges, prosecutors, and police have taken place in 2006 in relation to the new law, there is ample evidence that the statutory timelines for detention and other fundamental safeguards are almost invariably not applied.²⁶⁸

Initial findings of a joint campaign launched by UNAMA and AIHRC in October 2006 to analyse adherence to due process standards in detention facilities throughout Afghanistan indicate that in a significant proportion of cases, pre-trial detention time limits are breached, suspects are not provided with defence counsel, and ill-treatment and torture are used to force confessions.²⁶⁹

7. Transitional justice

A key transitional justice development was the launching by President Karzai, on 10 December, of a three-year "Action Plan on Peace, Reconciliation and Justice in Afghanistan".²⁷⁰ The plan, which covers crimes committed from 1978 until the establishment of the Interim Authority of Afghanistan in December 2001, contains five key elements: (1) the acknowledgment of the suffering of the Afghan people; (2) the need to strengthen state institutions; (3) the establishment of a Commission on Truth and Justice; (4) the promotion of

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, paras. 54-62.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ Government of Afghanistan, Afghanistan Independent Human Rights Commission and UNAMA, *Peace, Reconciliation and Justice in Afghanistan Action Plan*, 6-7 June 2005, available at http://www.aihrc.org.af/tj_actionplan_19_dec_05.htm (further: "National Peace and Reconciliation Charter").

reconciliation among the Afghan people; and (5) the establishment of a proper accountability mechanism for crimes committed.

The launching of the Action Plan was not, however, unanimously well received and provoked a strong reaction from powerful figures, including members of Government and the Parliament.²⁷¹ In this regard, a report by the Office of the High Commissioner for Human Rights indicates that “*the failure to prevent known human rights abusers standing for and winning parliamentary seats together with the continued practice of appointing individuals suspected of human rights violations to senior positions in Government has reinforced the de facto state of impunity in Afghanistan.*” It further states that these problems will make the full implementation of the Government’s Action Plan on Reconciliation, Peace and Justice unlikely.²⁷²

With regard to individuals allegedly responsible for committing grave human rights violations, including war crimes during the conflict, the report highlights that “*they have not been held to account and that others hold positions of authority.*”²⁷³

8. National Peace and Reconciliation Charter

On 20 February 2007, the Upper House of the Afghan Parliament discussed and adopted a “National Peace and Reconciliation Charter”,²⁷⁴ which was passed by Afghanistan’s Lower House of Parliament on 31 January 2007. This Charter, considered an amnesty law, prohibits legal and judicial proceedings against “*political parties and belligerent groups*” for “*fighting each other*” and of individuals who fought against the Islamic Republic of Afghanistan, but only if they “*respect the Constitution and the prevailing laws of the country.*”²⁷⁵

The Charter also provides an opportunity for individuals and groups still in opposition to the Islamic Republic of Afghanistan to benefit from its provisions as long as they join the process of national reconciliation, by respecting and observing the Constitution and other laws of the country.²⁷⁶

I. The socio-economic and humanitarian situation

Poverty is one of the greatest challenges currently facing Afghanistan and is both a cause and a result of the deterioration in the security situation.²⁷⁷ The population groups most affected are women, children, disabled persons, the elderly and the landless. Widespread unemployment throughout Afghanistan continues to limit the ability of a large number of Afghans to meet their basic needs. Labour migration continues to be an important source of

²⁷¹ HRC, *Report of the High Commissioner for Human Rights*, para. 40, see above footnote 144. Also see, Human Rights Watch, *Afghanistan: Justice for War Criminals Essential to Peace*, 12 December 2006, available at <http://hrw.org/english/docs/2006/12/11/afghan14826.htm>.

²⁷² HRC, *Report of the High Commissioner for Human Rights*, paras. 39-40, see above footnote 144.

²⁷³ *Ibid*, para. 44.

²⁷⁴ Asian Centre for Human Rights, *Afghan Charter of Impunity: President Karzai as the lame duck*, 21 February 2007, available at <http://www.achrweb.org/Review/2007/155-07.htm>.

²⁷⁵ Article 2 of the National Peace and Reconciliation Charter, available at http://www.aihrc.org.af/charter_national_reconciliation.htm (further: “Peace and Reconciliation Charter”).

²⁷⁶ Article 4 of the Peace and Reconciliation Charter, see above footnote 275.

²⁷⁷ HRC, *Report of the High Commissioner for Human Rights*, para. 3, see above footnote 144.

household budget support. Many families rely on transnational networks operating between Afghanistan and its neighbouring countries to seek employment abroad.²⁷⁸

In 2006, insecurity took a serious toll on the capacity of UN and aid organizations to provide humanitarian assistance in insurgency-affected areas, let alone pursue longer-term development programmes. Although progress has been made towards some short-term targets in the Afghanistan Compact, the achievement of a number of key benchmarks is at risk if the present levels of insecurity and insurgency continue.²⁷⁹ A report published by the AIHRC concludes that the Government of Afghanistan is currently failing to meet its minimum core obligations under the International Covenant on Economic, Social and Cultural Rights, ratified by Afghanistan in 1983.²⁸⁰

1. Food security

Afghanistan's first Millennium Development Goals Report²⁸¹ states that 40 percent of the rural population is unable to count on sufficient food to satisfy its most basic needs. UN agencies report a harvest shortfall of up to 1.2 million metric tons in 2006 and a drought affecting up to 2.5 million people, half of whom are children.²⁸²

The 2005 National Risk and Vulnerability Assessment Report²⁸³ found that some 6.6 million Afghans do not meet their minimum food requirements. In addition, around 400,000 people are seriously affected each year by natural disasters, such as droughts, floods, earthquakes and extreme weather conditions. Drought conditions in the east, south and southwest have resulted in a far smaller cereals harvest than originally expected in 2006. Fifty-four percent of children under five are stunted and 6.7 percent are wasted, while 72 percent of children under five and 48 percent of women are iron-deficient.²⁸⁴

2. Access to healthcare

The average life expectancy in Afghanistan for both men and women is 42 years which is among the lowest in the world. Maternal and infant mortality rates are among the highest in the world and stand at 1600 for 100,000 births and at 210 for 1000 live births, respectively. In 2000, per 100,000 births, 1900 women died from complications in pregnancy and childbirth.²⁸⁵ Less than 15 percent of deliveries are attended by trained health workers.²⁸⁶ A

²⁷⁸ See Afghanistan Research and Evaluation Unit publications on livelihoods and vulnerability available at http://www.areu.org.af/index.php?option=com_content&task=view&id=30&Itemid=35.

²⁷⁹ Joint Coordination and Monitoring Board notes Dec 2006 available at <http://www.and.s.gov.af/ands/jcmb/index.asp?j1=collapse&j2=collapse&j3=collapse&j4=collapse&j5=expand>.

²⁸⁰ Afghanistan Independent Human Right Commission, *Economic and Social Rights in Afghanistan II*, see above footnote 32.

²⁸¹ Islamic Republic of Afghanistan, *Millennium Development Goals Country Report 2005*, September 2005, available at http://www.and.s.gov.af/src/src/MDGs_Reps/MDGR_2005.pdf (further: "MDG Report 2005").

²⁸² UNICEF, "Statistics by Country: Afghanistan", available at http://www.unicef.org/infobycountry/afghanistan_statistics.html (further: "UNICEF").

²⁸³ Ministry of Rehabilitation and Development and Central Statistics Office, *The National Risk and Vulnerability Assessment Report 2005*, June 2007, available at http://www.cso-af.net/nrva2005/docs/Final_NRVA_2005_Report.pdf.

²⁸⁴ World Food Programme, "Afghanistan: Food Security Overview", 2007, available at http://www.wfp.org/country_brief/indexcountry.asp?country=004.

²⁸⁵ World Health Organization, *Afghanistan – Mortality Country Fact Sheet 2006*, 2006, available at http://www.who.int/whosis/mort/profiles/mort_emro_afg_afghanistan.pdf.

report published in September 2006 concludes that there have been some improvements in maternal health indicators but the disparity between rural and urban areas remains significant.²⁸⁷

Early pregnancy resulting from under-age marriages increases the risk of death during childbirth. It is estimated that 16 percent of Afghan girls are married before the age of 15, and 52 percent are married before their eighteenth birthday.²⁸⁸ Less than 40 percent of Afghan children receive life-saving vaccinations.

In terms of access to healthcare, Afghanistan's poor healthcare system has a very strong urban bias in its existing infrastructure. Overall, there are only 210 health facilities with beds to hospitalize patients. With the exception of four provinces, the current ratio of doctors per patient stands at one doctor per 10,000 patients.

Nevertheless, important progress in healthcare has been made through the Government's expansion of the basic package of health services. Under the National Health Policy 2005-2009, the Ministry of Public Health is focusing on accelerating the implementation of primary healthcare and Basic Package of Health Services (BPHS) and Essential Package of Hospital Services (EPHS). The BPHS includes maternal and newborn health, child health and immunization, public nutrition, communicable diseases, mental health, disability and supply of essential drugs.²⁸⁹

The EPHS has three main objectives:

- to identify a standardized package of defined clinical, diagnostic and administrative services for district, provincial and national hospitals;
- to provide a guide for the Ministry, NGOs and donors on how the hospital sector should be staffed, equipped and provided with drugs for the defined set of services at each level; and
- to promote a health referral system that integrates the BPHS within hospitals.

The standard services to be offered by hospitals under the EPHS include:

²⁸⁶ UNDP, *Afghanistan Human Development Report 2004*, p. 27, see above footnote 6. According to the findings from Human Rights Field Monitoring interviews conducted in 2006 by the AIHRC and UNHCR, only 34.2 percent of interviewees stated that a doctor/nurse (12.9 percent) or a midwife/trained birth attendant (21.3 percent) were present at birth of their children.

²⁸⁷ Johns Hopkins University, Bloomberg School of Public Health, Indian Institute of Health Management Research, *Afghanistan Health Sector Balance Scorecard – National and Provincial Results*, September 2006, available at http://www.jhsph.edu/refugee/response_service/afghanistan/Afghanistan_Balanced_Scorecard.pdf.

²⁸⁸ MDG Report 2005 (Summary Report), p. xvii, see above footnote 30. According to the findings from Human Rights Field Monitoring interviews conducted in 2006 by the AIHRC and UNHCR, 12.3 percent of interviewees stated that children in their families married before 16 years of age. Among the children who married before 16 years of age, 84.7 percent (1314) of them were girls whilst 15.3 percent of them were boys. See AIHRC, *Economic and Social Rights*, p. 31, see above footnote 32.

²⁸⁹ Ministry of Public Health, *National Health Policy 2005-2009 and National Health Strategy 2005-2006*, 26 March 2005, p. 19, available at http://203.215.43.35/resources/budget/formulation/sectors/health/policyandstrategy/national_health_policy_and_strategy_26_March_05.doc.

- for district hospitals: 30-75 beds, basic surgery, medicine, obstetrics and gynaecology, paediatrics, mental health, dentistry, plus support services for nutrition, pharmacy, physiotherapy, laboratory, radiotherapy and blood bank;
- for provincial hospitals: 100-200 beds; in addition to services provided by district hospitals, it would provide rehabilitation services and infectious disease control; and
- for regional hospitals: 200-400 beds; in addition to services provided by provincial hospitals, it would provide general surgery, urology, neurology, orthopaedics, plastic surgery, cardiovascular medicine, endocrinology, dermatology, oncology, forensic medicine and more developed support services.²⁹⁰

3. Access to safe drinking water

The 2006 Global Human Development Report²⁹¹ outlines basic development standards for safe drinking water by which 20 liters of clean water per person per day are considered the applicable human rights standard as is a government allocation of at least one percent of the gross domestic product (GDP) for equitable access to water and sanitation.

Afghanistan Millennium Development Target 13 is to halve, by 2020, the number of people without sustainable access to safe drinking water and sanitation.²⁹² The current baseline is estimated to be 77 percent of the Afghan population without access to an “*improved water source*.”²⁹³ Hence, only 23 percent of the Afghan population has access to safe water, 18 percent in rural and 43 percent in urban areas. Access to adequate sanitation is even lower, with an estimated 12 percent.²⁹⁴

The Government has set the target of reducing the proportion of Afghan people without sustainable access to an improved water source to 38.5 percent by the year 2020.²⁹⁵

According to the findings from Human Rights Field Monitoring interviews conducted in 2006 by AIHRC and UNHCR, 51 percent of interviewees use a covered water source, such as protected dug well or borehole, as safe drinking water, whilst 49 percent use an uncovered water source. Furthermore, 68 percent of interviewees stated that they were having problems with water, mainly related to quality (48 percent), availability (24 percent) and physical accessibility (23 percent) to the water source.²⁹⁶

4. Access to education

Afghanistan’s literacy rate is one of the lowest among developing countries. The average adult literacy rate is estimated at 28 percent of the overall population; female literacy rate is

²⁹⁰ *Ibid.*, p. 20.

²⁹¹ United Nations Development Programme, *Human Development Report 2006 – Beyond scarcity: Power, poverty and the global water crisis*, 9 November 2006, available at <http://hdr.undp.org/hdr2006/> (further: “UNDP, *Human Development Report 2006*”).

²⁹² *MDG Report 2005*, see above footnote 281.

²⁹³ According to UNDP, an improved water source is one that is likely to provide ‘safe’ water such as a household connection, borehole, public standpipe, protected dug well, protected spring or through rainwater collection. UNDP, *Human Development Report 2006*, p. 410, see above footnote 291.

²⁹⁴ Afghanistan Independent Human Right Commission, *Economic and Social Rights in Afghanistan II*, pp. 25-26, see above footnote 32.

²⁹⁵ *Ibid.*, p. 27.

²⁹⁶ *Ibid.*, pp. 25-26.

12.6 percent.²⁹⁷ The *Taliban* exclusion of girls from school during 1995-2001 worsened the gender disparity in literacy. The UNICEF “Back to School” campaign – started in 2002 – has seen more than three million students return to school and enrolment in schools has continuously increased. Currently, 5.1 million children are attending schools. Of this number, about 4.5 million children are in primary school (1.53 million of them are girls). Thirty-seven percent of girls between the ages of 7 and 12 are attending school for the first time. Despite the relative success of the “Back to School” campaign, an estimated 2 million children are currently not attending school; 1.2 million of these are girls.²⁹⁸

The main causes of low attendance rates for girls are the inadequate number of formal schools or qualified teachers, the lack of physical accessibility of schools due to security concerns (e.g. attacks or abductions) and negative parental attitudes regarding girls’ education.²⁹⁹ In addition, early marriage is a significant factor in the high drop-out rates for girls. An AIHRC study has found that the proportion of girls who fail to complete primary education is almost half the rate of boys’ completion. To address one of the obstacles to girls’ school attendance, the Ministry of Education is training a pool of female teachers and is offering land and housing incentives for deployment of female teachers to areas in which there is a lack of qualified female teachers.

As mentioned above, the education system has also faced setbacks as a result of the deteriorating security due to the insurgency, especially in the south, southeast and east of the country. Over 200 schools have been burned and around 400 schools have been closed during 2006. Furthermore, at least 15 teachers were killed due to the insurgency-linked violence throughout the country.³⁰⁰

5. Employment

It is estimated that the overall unemployment rate in Afghanistan is 32 percent, and for marginalized groups such as women and the disabled, the rate is much higher. Afghans have limited access to education and training, and labour rights hardly exist.³⁰¹ By the end of 2010, the Afghanistan Government aims to train 150,000 Afghans in marketable skills – 40 percent of them will be women. Poverty in places affected by the conflict has an impact on insurgents’ recruitment as Afghans are driven by a lack of resources, poor education and general disenchantment.

²⁹⁷ CIA, *World Factbook: Afghanistan*, see above footnote 2.

²⁹⁸ UNICEF, see above footnote 282.

²⁹⁹ According to the findings from Human Rights Field Monitoring interviews conducted in 2006 by the AIHRC and UNHCR, 98 percent of interviewees stated that primary schools were available for boys whilst 90 percent of interviewees stated that they were available for girls. Moreover, 73.6 percent of interviewees reported that their boys go to school regularly and 11.4 percent reported they never go to school, whilst 63.3 percent stated that their girls go to school regularly and 22.6 percent stated they never go to school. The main reason (27.5 percent of interviewees) provided as to why their girls do not attend school regularly is the physical inaccessibility to schools, including the distance being too far or they are worried about security. As far as the primary school completion rate is concerned, 39.7 percent of interviewees stated that their girls leave school before Grade 6, whilst 19.1 percent stated that their boys leave school before finishing Grade 6. AIHRC, *Economic and Social Rights*, see above footnote 32.

³⁰⁰ HRC, *Report of the High Commissioner for Human Rights*, para. 31, see above footnote 144.

³⁰¹ International Labour Organization, *Afghanistan’s Labour Situation: Facts and Questions*, available at www.unama-afg.org/docs/ UN-Docs/ fact-sheets/ILO-FAQ-eng.doc.

With regard to the situation of returnees, findings from the Human Rights Field Monitoring conducted by AIHRC and UNHCR indicate that the large majority of interviewed returnees (91 percent) has returned to their place of residence before exile. Only nine percent were found to have returned to areas other than their previous places of residence in Afghanistan. Reasons provided by these returnees were lack of housing (67 percent) and job opportunities (18 percent). In terms of sources of income, 62 percent of the interviewees stated that their main source of family income is non-farm labour, and over 50 percent said that it was from daily wage labour as unskilled workers. Among those interviewees (37 percent) who stated that their main family source of income is from farm labour, 58 percent said they were landowners, whereas 11 percent were daily wagedworkers. Among those interviewees who stated they had a job (65 percent), 60 percent said that their average daily income is less than 50 Afghani (US \$ 1) per day.

Vulnerability to income failure is the result of almost complete immersion in the cash economy and the reliance on urban labour markets. For the unskilled and less literate labour force, access to employment opportunities is usually limited to the daily-wage labour, which is very competitive. Job opportunities for unskilled persons, especially those with less competitive power, such as the elderly, people with disabilities and other health problems, are irregular and subject to high seasonal variance.

6. Land and housing

The exercise of land, housing and property rights pose serious challenges and obstacles to the return of refugees and their reintegration as does, more generally, security of land tenure. The situation with regard to land and property in Afghanistan has been analysed and described in several studies³⁰² and it is now generally recognized that there is a need to address it as a key priority both with regard to the legal and economic situation of the country.

The Afghanistan Compact sets targets to address land and property issues through land registration and the setting-up of systems to address land disputes:

*“A process for registration of land in all administrative units and the registration of titles will be started for all major urban areas by end-2006 and all other areas by end-2008. A fair system for settlement of land disputes is intended to be in place by end-2007 (please see following paragraphs with regard to prospects for restitution). Registration for rural land will be underway by end-2007”.*³⁰³

a) The situation in rural areas

Afghanistan’s arable land constitutes 12 percent of the total land area. There is a high degree of rural landlessness and near-landlessness. Around 40 percent of arable land is owned by less than 10 percent of the population. Up to 36 percent of all owners have their land under a form of mortgage that is to the full advantage of creditors, resulting in high and increasing

³⁰² See L. A. Wily, *Rural Land Conflict and Peace in Afghanistan*, Afghanistan Research and Evaluation Unit, February 2004; UN-Habitat, *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan with Special Reference to Kabul City*, March 2003, available at http://www.fukuoka.unhabitat.org/out/siryo/project_b/01/Afghan_Land_Report.5_Aug_03.pdf (further: “UN-Habitat”).

³⁰³ Afghanistan Compact, see above footnote 27.

indebtedness and vulnerability. Formal land records, where they exist, are unreliable. Traditional or statutory controls relating to boundaries between arable and pastoral lands have broken down, resulting in rampant encroachment, contestation and environmental degradation. This situation is aggravated by the fact that there are inconsistencies among and within bodies of law, often resulting in a generally unclear legal status both in formal and informal justice systems. The weak rule of law renders application or enforcement of the law unlikely at this point.³⁰⁴ The power and influence of armed political groups extends into the formal and informal justice systems, leaving rural Afghans at the mercy of these groups and with little ability to access justice.³⁰⁵ The widespread and severe environmental degradation of land in Afghanistan compounds the issues of water, land and access to natural resources. Conflict, drought, population movements, population growth and lack of local and national policies have contributed to erosion, deforestation, and desertification.³⁰⁶

b) The situation in urban areas

The estimated number of urban dwellers in Afghanistan is 6.4 million – 30 percent of the total population, mainly concentrated in the cities of Kabul, Herat and Jalalabad.³⁰⁷ Most cities are currently experiencing a steady influx of urban returnees and IDPs and by 2015, the number of urban residents in Afghanistan is expected to double, growing at a rate twice as high as the average growth rate in rural areas.³⁰⁸

Rapid urban growth is very likely to lead to an increase in the number of poor and vulnerable populations, thereby posing great challenges to urban planning and development.³⁰⁹ There are some key differences between the situation of Afghans in urban and rural environments, which can increase levels of vulnerability, and susceptibility to poverty and destitution for residents in urban areas. One such key difference seems to be the absence of vital social networks amongst urban poor, in comparison to rural communities. In terms of reliance on family members, studies have identified the household and the extended family as the basic social network in Afghanistan. However, a recent study did not find any indication of existing traditional systems of sharing and redistribution in the extended urban family, the existence of which have been confirmed for rural areas.³¹⁰ A further major difficulty is the almost total reliance, in urban areas, on a cash-based economy and the precariousness of employment with heavy reliance on insecure casual and daily labour functioning as sources of income.³¹¹

³⁰⁴ L.A. Wily, *Rural Land Conflict and Peace in Afghanistan*, see above footnote 302.

³⁰⁵ Feinstein International Famine Centre Youth and Community Program, Tufts University, *Human Security and Livelihoods of Rural Afghans*, June 2004, p. 55, available at http://fic.tufts.edu/downloads/human_security_and_livelihoods_of_rural_afghans.pdf.

³⁰⁶ *Ibid.*

³⁰⁷ Government of Afghanistan, *Securing Afghanistan's Future – Accomplishments and the Strategic Path Forward*, 17 March 2004, available at <http://www.adb.org/Documents/Reports/Afghanistan/securing-afghanistan-future-final.pdf>.

³⁰⁸ *Ibid.*

³⁰⁹ Stefan Schutte, *Urban Vulnerability in Afghanistan: Case Studies From Three Cities*; Working Paper Series, Afghanistan Research and Evaluation Unit, May 2004, at p. 3, available at http://www.areu.org.af/?option=com_docman&Itemid=&task=doc_download&g (further: “Schutte, *Urban Vulnerability in Afghanistan*”).

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

The situation with regard to land tenure in urban areas indicates similar problems and challenges to those in rural areas.³¹² Property law is outdated and disregarded. There is no consistency in the recognition of ownership by the authorities and multiple ownership is a problem due to the sales of State-owned apartments and plots and the sale without regard for the inheritance rights of others. The municipal property administration is inconsistent and the existing master plan outdated and not corresponding to realities.

It is against this background that land and property issues pose a serious challenge for many Afghans, including many returnees, both in terms of livelihoods and in terms of respect for their rights and legal safety.³¹³

Given the centrality of land-ownership in income-generating and sustaining livelihoods, the large numbers of returnees who claim to be landless, either because they never owned land or because they were forced to sell it or abandon it prior to fleeing the country, poses an obstacle to return. Given instances of illegal occupation of Government-land and the difficulties in determining with certainty whether land is Government-owned or not, a general freeze on the allocation of Government-land has been ordered by Presidential Decree.³¹⁴ Exceptions are possible to obtain, in the context of urban housing, through the High Commission on Urban Development and Housing, but no formal criteria for housing schemes have been developed as yet.

The limited size of land holdings is another land-related problem. This is particularly the case for returnees whose families have grown in exile and the land they own is no longer sufficient to cover their needs.

The livelihood of many landless Afghans is dependent on sharecropping arrangements, which some find difficult or impossible to ensure and re-negotiate. A number of returnees have reported such arrangements to have become more exploitative, thereby reducing their levels of income.

Land occupation and confiscation of land by powerful local commanders or members of the majority ethnic group in areas of return has been reported by returnees or stated as an obstacle to return. Returnees, therefore, face difficulties in recovering property upon return from exile. A particular feature of such land occupation is the use of traditional pastureland for cultivation purposes, thereby depriving or seriously jeopardizing the return of refugees and IDPs, whose livelihoods were based on animal husbandry.

In numerous instances, disputed ownership of land and property and difficulties of recovery arise as a result of more than one person claiming property rights to land or houses, due to the fact that different regimes have issued land titles for the same property to different owners.

There have been cases of evictions, in which Afghans, including returnees, have been evicted without compensation from houses and land they were occupying. The evictions were the result of influential commanders and/or persons claiming to own or having purchased the property.

³¹² UN-Habitat, see above footnote 302.

³¹³ UNHCR, *Repatriation Process of Afghan Refugees*, 1 September 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=3fccca304>.

³¹⁴ Presidential Decree No. 99 on Non-Distribution of Intact and Uncultivated State Owned Land, 24 April 2002 (4/2/1381), available at <http://www.idlo.org/AfghanLaws/2002-2003.htm>.

c) The National Land Allocation Programme

A Presidential Decree governing the allocation of public land to landless returning Afghan refugees and IDPs was issued in late 2005.³¹⁵ Under the auspices of the Ministry of Refugees and Repatriation, the decree legalizes the distribution of intact and uncultivated Government land to address the needs of returnees for land and the construction of shelter. For the first full year of implementation of the scheme, some 53,000 returnee families were selected and 3,000 (some 15,000 individuals) physically moved to their newly acquired plot of land and started building permanent shelters. In support of the scheme, the Afghan Government has allocated US \$ 2.5 million under its Afghan year 1385 (21 March 2006 – 20 March 2007) National Development Budget and US \$ 4 million in year 1386 (21 March 2007 – 20 March 2008). In late 2006, the US Government contributed US \$ 4.5 million in support, through direct implementation by NGOs, to the construction of shelter, access roads and digging of water points in five pilot locations. In 2007, the further expansion of the Land Allocation Scheme will require a concerted effort by all actors (concerned ministries, donors, NGOs, UNHCR and sister UN agencies) to ensure that minimum essential needs are met and that the required institutional arrangements are in place for the Scheme to be adequately managed and coordinated.

The criteria for beneficiary selection, stipulated in the Decree, are quite wide and subject to interpretation, and thus require clarification, in particular with regard to Afghan returnees and IDPs who are *Kuchis*, and with regard to Afghan IDPs, displaced outside their province of origin, who are unable to return. However, the criteria stipulate that the Scheme is open for landless refugees and IDP returnees who do not own land or a house under their name, that of their spouses or minor children in Afghanistan. While the Government considers all eligible returnees for land distribution, it gives priority to the disabled, widowed and those families without a male head of household.

Land distribution under the Decree will ideally take place in the places of origin of returnees. However, if Government-land is not available for distribution in the province of origin, eligible returnees and IDPs will receive land in a neighbouring province, provided the neighbouring province has capacity for absorption.³¹⁶ The size of a plot of land varies by province and ranges between 3-6 *Biswas*.³¹⁷ The Decree also stipulates that a beneficiary must pay a fee for the land, construct a house on the distributed land in accordance with the specifications provided by the Government, and is not allowed to sell the plot of land for a period of ten years.³¹⁸

In 2006, UNHCR identified a number of *Kuchis* returnee families in Khost, Paktia, Maidan Wardak and other provinces who were discriminated against by local officials. This was mainly due to an interpretation of Decree No. 104 unfavourable to *Kuchis*, many of whom have not one – as the Decree stipulates – but two provinces of origin – one summer-pasture and one winter-residence –, and due to the lack of clear guidelines for selection of beneficiaries. *Kuchis* returnees were therefore considered as seasonal migrants and thus not falling within the category of beneficiaries for the land allocation.

³¹⁵ Presidential Decree No. 104 on Land Distribution for settlements to eligible returnees and IDPs, signed in 2005.

³¹⁶ *Ibid.*

³¹⁷ Each *Biswa* equals 100 square meters.

³¹⁸ Article 11 (c) of the Presidential Decree No 104. See above footnote 315.

With a view to address the issue of *Kuchis* settlement in a comprehensive manner, including of *Kuchi* IDPs and returnees, a Commission, composed of representatives of several Ministries and under the supervision of the Ministry of Housing and Urban Planning, was established in 2005. This Commission was tasked to study the issue of *Kuchis* comprehensively and to subsequently prepare a descriptive plan.³¹⁹ To date, however, limited progress has been made and decisions on land allocation to *Kuchis* are on hold in various provinces. The cases of *Kuchis* of individual tribes are considered on an *ad hoc* – and therefore unpredictable – basis by the Cabinet.

J. The situation of internally displaced persons

Internally displaced persons (IDPs) in Afghanistan fall under the shared functional responsibility of the Ministry of Refugee and Repatriation (MORR) and the Ministry of Rural Rehabilitation and Development, with UNHCR lending support functions to the MORR in co-coordinating strategy development and responses.³²⁰

In a collaborative effort, a National IDP Plan was developed in 2003. The Plan outlines Afghanistan's strategy to work towards durable solutions through a combination of assisted voluntary return and local settlement. The strategy for local settlement envisages the transformation of IDP camps into permanent settlements in order to prevent further displacement in accordance with the UN Guiding Principles on Internal Displacement,³²¹ humanitarian standards and in the framework of relevant national regulations.

Recent data suggests that of those displaced prior to March 2002, some 129,044 people remain displaced within Afghanistan, for the most part living in camp-like situations, mainly in the south of the country.³²² The regional breakdown of IDP population at the end of 2006 was as follows:

- some 112,107 individuals in the southern region, mainly in camps/settlements in Kandahar and Helmand provinces;
- some 11,153 individuals in the western region, mainly in Maslakh settlement in Herat;
- some 3,600 individuals in Kabul and other areas in the centre region; and
- some 3,285 individuals in the northern region.

Since 2002, a total of 98,415 internally displaced families or 487,547 individuals have been assisted to return to their places of origin in Afghanistan. IDPs who returned with assistance have returned to the following regions in Afghanistan: north (168,579), west (154,098),

³¹⁹ Order of the President of the Islamic Republic of Afghanistan on the Establishment of a Commission for the Resolution of the *Kuchi*'s Settlement Problem, No. 951, dated 11.02.1384 (1 May 2005).

³²⁰ Ministry of Refugees and Repatriation, *Ministry Strategy for the Afghanistan National Development Strategy (With Focus on Prioritization)*, March 2007, available at <http://www.and.gov.af/strategies/src/SocialProtection/MoRR-English.pdf>.

³²¹ UN Secretary-General, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 11 February 1998, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3d4f95e11>.

³²² UNHCR, *Operational Information Summary Report June 2007*, June 2007, Part 2, available at <http://www.aims.org.af/rootll.aspx?seckeyf=485> (further: "UNHCR, Operational Information").

central (124,155), south (22,001), southeast (4,001) and other locations in Afghanistan (520).³²³

New displacements of population in the south as a result of the military activities in Panjway and Zare Dasht districts of Kandahar province occurred during the summer of 2006. The numbers of these conflict-affected IDPs were initially estimated to be as high as 15,000 persons by provincial authorities, but it has been difficult for UNHCR to obtain accurate and reliable data to confirm these numbers. Aerial bombardments in April 2007 in the Zirkoh area of Shindand also caused a displacement of population. While exact figures of the displacement are unavailable, elders of the area estimate that displacement has affected between 3,000 and 5,000 families.³²⁴ In the northern Region, 144 individuals of Uzbek ethnic origin remain displaced in Maimana city out of a group of 300 families displaced in Faryab province during the summer of 2006 as a result of military conflicts between the followers (local commanders) of two political parties (*Junbish* and *Azadi*).

The UN response, coordinated by UNAMA, has been to support the provincial authorities – the Disaster Management Committees – in their humanitarian response, in liaison with the local Provincial Reconstruction Teams. Most of these new IDPs stay with relatives and their return to their places of origin is hindered by ongoing fighting, intimidation and fear of being killed by *Taliban* insurgents, and destruction of homes and livelihoods.

K. General consideration on voluntary returns to Afghanistan

Since 2002, some 3.9 million Afghans have returned to Afghanistan facilitated by UNHCR: from exile in Pakistan (3.05 million); Iran (some 848,000); and countries in Central Asia, Europe or further afield (13,091). In addition to such facilitated return some 1.1 million returned spontaneously from Pakistan (more than 302,000) and Iran (more than 841,000). More than 439,000 returned forcibly from Pakistan (5,631) and Iran (433,578) which makes the total return from Pakistan, Iran and other countries 5.3 million.³²⁵

According to the latest statistical information, nearly four million Afghans continue to reside in neighbouring countries: (2.15 million) in Pakistan;³²⁶ 920,000 in Iran; and 286,000 Afghans remain in other countries.³²⁷

Facilitated voluntary repatriation to Afghanistan is governed by a framework of tripartite agreements, signed between Afghanistan, UNHCR and a number of countries hosting Afghan refugees. With Iran, a Tripartite Agreement was renewed in Mashad in February 2007, and provides a framework for return until 19 March 2008.³²⁸ The renewal of the Tripartite

³²³ *Ibid.*

³²⁴ UNAMA, *Report: Mission to Shindand*, 1 May 2007. See also UNAMA, *Talking Points*, 7 May 2007, available at <http://www.unama-afg.org/news/pb/english/2007/May/07may7.html>.

³²⁵ UNHCR, *Operational Information*, Parts 1 and 2, see above footnote 322.

³²⁶ UNHCR/ Ministry of States & Frontier Regions Government of Pakistan, National Database & Registration Authority (NADRA), *Registration of Afghans in Pakistan 2007*, May 2007, available at <http://www.unhcr.org.pk/emergency/Registration Report.pdf>.

³²⁷ UNHCR, *The many roads home from Iran to Afghanistan*, 30 May 2007, available at <http://www.unhcr.org/news/NEWS/465d802a4.html>.

³²⁸ Article 29 of the Joint Programme between the Government of the Islamic Republic of Iran, the Transitional Islamic State of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons, signed on 16 June 2003 and available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42fb47e54>. The original Joint Programme was valid until 20 March

Agreement between UNHCR, the Islamic Republic of Pakistan and Islamic Republic of Afghanistan has been agreed until 31 December 2009. In addition, and unique to the operation in Afghanistan, tripartite frameworks for the return of Afghans, including parameters for the phased and coordinated return of persons determined not to be in need of international protection and without compelling humanitarian needs, have been concluded with France,³²⁹ the United Kingdom,³³⁰ the Netherlands,³³¹ Denmark,³³² Norway,³³³ Switzerland³³⁴ and Sweden. Discussions are underway to have a similar tripartite agreement with the Government of Belgium.

The traditional family and community structures of the Afghan tribal system constitute the main protection and coping mechanism. The support provided by families, extended families and tribes is limited to areas where family or community links exist, in particular in the place of origin or habitual residence. Return to places other than places of origin or previous residence, may therefore expose Afghans to insurmountable difficulties, not only in sustaining and re-establishing livelihoods but also to security risks. Security risks may include, *inter alia*, arbitrary detention and arrest, targeted killings based on ethnic rivalries and family-based conflicts. Finally, while there has been significant progress on the reintegration front of returnees to Afghanistan, the needs continue to be immense and urban centres continue to be faced with numbers of returnees, which are difficult to absorb.

In this regard, given the differences particular to the situation in Afghanistan, UNHCR advises, against the return of persons to areas other than their places of origin or previous area of residence where they do not have effective family or tribal links. This position is in line with Executive Committee Conclusion No. 40, which states that:

“UNHCR facilitates voluntary repatriation only when return is possible to previous places of residence in the country of origin. In UNHCR’s

2005 and was last extended on 27 February 2007, see, for instance, IRIN News, *Afghanistan-Iran: Afghan refugees given repatriation extension*, 28 February 2007, available at <http://www.irinnews.org/Report.aspx?ReportId=70450>.

³²⁹ Tripartite Agreement between the Government of the French Republic, the Government of the Islamic Transitional State of Afghanistan and UNHCR (L'accord tripartite entre le Gouvernement de la République française, le Gouvernement de l'Etat de transition islamique d'Afghanistan et le Haut-Commissariat des Nations unies pour les réfugiés), Paris, 28 September 2002, available in French at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MAEJ0230061D>.

³³⁰ Tripartite Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland, the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan and United Nations High Commissioner for Refugees, Kabul, 12 October 2002, available at <http://www.unhcr.org/cgi-in/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&page=SUBSITES&id=3f5d9799a>.

³³¹ Tripartite Memorandum of Understanding between the Government of the Netherlands, the Transitional Islamic State of Afghanistan, and United Nations High Commissioner for Refugees, the Hague 18 March 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42fb2c164>.

³³² Tripartite Memorandum of Understanding between the Islamic Transitional State of Afghanistan, the Government of Denmark, and the United Nations High Commissioner for Refugees, Copenhagen, 18 October 2004, available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&page=SUBSITES&id=430d7bec2>.

³³³ Tripartite Memorandum of Understanding between the Government of Norway, the Islamic Republic of Afghanistan, and the United Nations High Commissioner for Refugees, Kabul, 10 August 2005, available at <http://www.unhcr.org/cgi-in/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&page=SUBSITES&id=430afab82>.

³³⁴ Accord tripartite entre le Conseil fédéral suisse, le Gouvernement de la République islamique d'Afghanistan et le Haut Commissariat des Nations Unies pour les réfugiés, Geneva, 5 October 2006, available in French at http://www.bfm.admin.ch/etc/medialib/data/migration/rechtsgrundlagen/internationale_rechtsquellen/ruecknahmeabkommen.Par.0055.File.dat/Afghanistan_f.pdf.

*experience, return to areas other than the refugee's place of origin or previous residence may impact adversely on the protection situation of the returnees themselves, which of others in the place of return, and more generally on the processes of stabilization, reintegration, and reconciliation".*³³⁵

The same principle applies to the return of persons found not to be in need of international protection. The Executive Committee in its Conclusion No. 96 (LIV) of 2003 on the return of persons found not to be in need of international protection “[s]tresses the importance of ensuring the sustainability of returns and of avoiding further displacements in countries emerging from conflict, and notes that phasing returns of persons found not to be in need of international protection can contribute to this”.³³⁶

³³⁵ UNHCR, *Global Consultations on International Protection/Third Track: Voluntary Repatriation*, EC/GC/02/5, 25 April 2002, p. 7, available at <http://www.unhcr.org/cgi-bin/teix/vtx/refworld/rwmain?docid=3d62695d4>.

³³⁶ UNHCR, *Conclusion on the return of persons found not to be in need of international protection*, No. 96 (LIV) – 2003, 10 October 2003, para. 1, available at <http://www.unhcr.org/cgi-bin/teix/vtx/refworld/rwmain?docid=3f93b1ca4>.

III. INTERNATIONAL PROTECTION CONSIDERATIONS WITH REGARD TO AFGHAN ASYLUM-SEEKERS AND REFUGEES

A. *General considerations*

Despite a number of positive political developments, Afghanistan continues to face significant challenges in strengthening good governance, progressing in social and economic development and ensuring security for its citizens.

Notwithstanding significant achievements, there is evidence that at least some Government officials have links to armed groups and criminal networks.³³⁷ Of even greater concern is the deteriorating security situation typified by heightened levels of anti-Government violence. The recent upsurge in violence in the south, southeast, east, west and central regions of the country poses serious risks to Afghanistan's political, economic and social gains. The severity and consistency of incidents attributed to anti-Government elements and the number and intensity of military operations, have once again made personal security the paramount concern of most Afghans. The negative impact on economic growth in affected regions is equally a real concern. If not effectively and urgently addressed, the insurgency could have a profoundly negative impact on the considerable achievements of the process, initiated with the Bonn Agreement and the subsequent Afghanistan Compact.³³⁸

The re-emergence of previous and new militia commanders in many parts of the country and escalating violence due to the insurgency require particular consideration of possible risks emanating from non-State actors.³³⁹ The reach of the central Government in a number of provinces in the eastern, southeastern and southern, central and western parts of the country has been significantly reduced due to the growing number of armed attacks and reported *de facto* Taliban control. Furthermore, in the northern part of Afghanistan factional violence and criminality continue to pose significant challenges to the authority of the Government in a number of areas.

In light of the above, Afghans with particular profiles, as elaborated upon below, may continue to need, subject to an assessment of their individual circumstances, international protection as refugees under the 1951 Convention. Others, depending on their profile and place of residence, may require international protection due to indiscriminate human rights abuses and generalized violence in parts of the country. As the security situation is fluid and deteriorating, currently insecure areas are not listed herein.

³³⁷ Amnesty International, *Afghanistan: Human rights challenges facing Afghanistan's National and Provincial Assemblies – an open letter to candidates*, 15 September 2005, available at <http://web.amnesty.org/library/index/engasa110112005>.

³³⁸ UN SC, *Situation in Afghanistan 11 September 2006*, see above footnote 186.

³³⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314>. According to paragraph 65 of the Handbook, "persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned [...] Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."

B. Considerations concerning inclusion for refugee status under the 1951 Convention criteria

Article 1A(2) of the 1951 Convention, provides that the term “refugee” should apply to any person who “*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*”

The above definition contains both a subjective and an objective element. The former refers to an individual’s fear of harm in the event of return to the country of origin or, in the case of a stateless person, the country of habitual residence. The objective element refers to the applicant’s fear being well-founded, which means that there is a reasonable likelihood that the harm feared or some other form of harm would occur.

Whether a fear is well-founded needs to be determined in the context of the situation in the country of origin, taking into account the personal profile, experiences and activities of the applicant, and, where relevant, others. Even where an individual may not have personally experienced threats or risks of harm, events in his or her area of residence or relating to others with similar profiles may nonetheless give rise to a well-founded fear of persecution. The analysis of an asylum application should therefore include a full picture of the asylum-seeker’s background and personal circumstances, and the prevailing situation in his or her area of origin or previous residence in Afghanistan. This assessment should include family and extended family links and community networks in order to identify possible traditional protection and coping mechanisms *vis-à-vis* the current *de facto* local authorities. This requires establishing for each case the profile of nuclear and extended family members, including their location, their previous and current social status, and their political and tribal affiliations in Afghanistan or abroad.

There is no definition of the term “persecution” in international law. A threat to life or freedom, other serious harm or serious violations of human rights would constitute persecution. Moreover, persecution is not limited to acts which cause physical harm. Severe discrimination could also amount to persecution, in particular where livelihood is threatened. Measures which restrict one’s ability to earn a living so that survival is threatened would thus amount to persecution. Discriminatory measures that are not of a serious character by themselves may amount to persecution on a cumulative basis.

In the context of Afghanistan, there are targeted killings and kidnappings, intimidation by armed groups, and the threat of more indiscriminate forms of violence such as suicide attacks and improvised explosive devices. Discrimination is also varied, from denial of access to services, land expropriation and, based on conservative social mores rather than law, wide-ranging restrictions on women.

In order to fall within the refugee criteria, there must be a nexus between the relevant act or measure amounting to persecution and least one of the 1951 Convention grounds; race, religion, nationality, political opinion, and membership in a particular social group. More than one Convention ground may also be applicable.

Much of the violence stemming from the insurgency is based on political opinion, as those targeted are associated with or perceived as supporting the government or the international community. Persecutory acts following criticism or defiance of local commanders are also linked to political opinion as are threats to those formerly associated with the People's Democratic Party of Afghanistan.

With respect to Afghanistan, membership of a particular social group is often combined with the ground of "religion" and (imputed) political opinion. As set out in UNHCR's relevant Guidelines:

*"a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."*³⁴⁰

This encompasses two different ways of defining a "particular social group": on the one hand, under the so-called "protected characteristics" approach, a group is considered to be united by an immutable characteristic or one that is so fundamental to human dignity that a person should not be compelled to forsake it. On the other hand, individuals who share a common characteristic which makes them a cognizable group or sets them apart from society at large may also form a particular social group.³⁴¹

Membership of a particular social group will, in the context of Afghanistan, thus apply to, amongst others, homosexuals, victims of serious trauma which becomes known to others, unaccompanied children, individuals at risk of harmful traditional practices, and women with specific profiles.

Afghan women, in most part, are required to follow particular codes of behavior. Where a woman refuses or otherwise does not conform her behavior in accordance with this code, and faces punishment as a result, she may have a well-founded fear of persecution. Persecution can take the form of honor killings or other violence as well as discriminatory restrictions related to education, moving outside the home without a male relative or participating in the work-force. Risks due to failure to conform to the conventional roles and restrictions on women's conduct can be viewed as either linked to the ground of religion and/or political opinion, as non-conformity can be seen as opposing traditional power structures.

Based on currently available information on Afghanistan, persons with the following profiles might be exposed to a particular risk of violence, harassment or discrimination and, depending on the circumstances of the individual case, could fall under the scope of Article 1 A(2) of the 1951 Convention Relating to the Status of Refugees.

³⁴⁰ UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para. 11, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3d36f23f4>.

³⁴¹ *Ibid.*, paras 6-7.

1. Afghans perceived as critical of factions or individuals exercising control over an area

Afghans expressing their political opinions are exposed to risk if these opinions are perceived as critical of the interests of local and regional commanders, powerful factions or armed opposition forces, primarily the *Taliban* and forces allied with the *Taliban* movement or with veteran Pashtun warlord *Gulbuddin Hekmatyar*. Risks also continue to exist for persons known to have political affiliations different from those of persons linked to armed factions exercising *de facto* power at the local level.

While the last two years have seen an increase in the formation of political parties throughout the country, uneven conditions have been observed for the exercise of political rights. Whereas conditions have been conducive for a wide variety of political activities in Kabul, in other parts of the country political activities are discouraged or restricted. The exercise of political rights is restricted by the factional elements (high ranking or powerful Government officials or irregular militia commanders) in power and by the extent to which they tolerate political activities and freedom of expression.³⁴² There is also a large degree of self-censorship practiced by political parties and by political or civil society activists in Kabul as well as in other provinces.³⁴³

The exercise of political rights also presents a problem for the physical safety of individual Afghans especially in rural areas.³⁴⁴ Violent attacks carried out by the *Taliban* and anti-Government forces have contributed to a deterioration of the security situation in all areas (i.e. eastern, central, southeastern, southern and western regions), except the north and northeast, as a number of Afghan civilians have been targeted and killed. Commonplace in some of these areas are so-called “night-letters” warning civilians in general or specific individuals not to support the Government or work for international organizations. Persons-at-risk include, *inter alia*: Afghans raising the issue of past crimes and gross human rights violations committed during the period between 1992 to 1996; those denouncing ongoing human rights violations; those critical of powerful factions and local commanders; and those affiliated with Western organizations or perceived as propagating Western values. The case of Malalay Joya, female MP from Farah province, who was physically and verbally attacked by fellow members of Parliament after accusing several colleagues of being “warlords” and unfit for service in the new Afghan Government highlights the environment in which Afghans exercise their civil and political rights.³⁴⁵ On 21 May 2007, the *Wolesi Jirga* voted to suspend Malalai Joya for three years from the legislature on defamation grounds.

Curbs on the media with regard to freedom of expression remain a concern.³⁴⁶ The debate surrounding the new Media Law highlighted the difficulties in achieving consensus on

³⁴² Afghanistan Independent Human Rights Commission – UNAMA, *Joint Verification of Political Rights: National Report*, 17 July 2004, available at <http://www.aihrc.org.af/jvoprfr.htm>.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ See for instance, Radio Free Europe, *Afghanistan: Suspended Lawmaker Insists Hers Is Voice Of The People*, 24 May 2007, available at <http://www.rferl.org/featuresarticle/2007/05/3E02C247-B2A5-40CD-98ED-93C95972C14A.html>; Telegraph Magazine, *Malalai Joya: courage under fire*, 29 September 2007, available at http://www.telegraph.co.uk/arts/main.jhtml?xml=/arts/2007/09/29/sm_joya.xml&page=1; see also, BBC, *Profile: Malalai Joya*, 12 November 2005, available at http://news.bbc.co.uk/2/hi/south_asia/4420832.stm.

³⁴⁶ See Section H(2) Freedom of Expression.

freedom of the press. There is limited understanding of freedom of expression, which is exacerbated by intimidation resulting from the dominance of strong political and armed factions and weak rule of law. This leads journalists to self-censorship on sensitive issues and to present their work as moderate and mainstream. In particular, conservative forces have tried to exercise media control by threatening and physically attacking journalists.³⁴⁷ The repeated detention and threats to Kamran Mir Hazar, journalist for the national radio news program *Salaam Watandar* and chief editor of the Web site *KabulPress*, is an example of the pressure that can be exerted by the Afghan authorities against journalists who are vocal against corruption and Government policies.³⁴⁸ In addition to the censorship and pressures faced from officials, journalists are also exposed to direct threats, increasing violence and to targeted attacks from non-State actors.

As a result, journalists may be exposed to a risk of persecution by non-State agents if they publish opinions critical of the *Mujaheddin*, the insurgency, disclose human rights abuses, corruption and bribery, or express views on religion, secularism, and freedoms that are at odds with conservative social norms.

2. Government officials

Targeted assassinations of provincial and district Government officials, including judges, law enforcement officials, high profile local officials and female public figures are a worrying trend.³⁴⁹ In August 2006, two female members of the Provincial Council in Laghman province were moved to the capital of the province following death threats.³⁵⁰ In September 2006, the Head of the Provincial Department of the Ministry of Women's Affairs was assassinated in Kandahar. In October, one male member of the Provincial Council in Kandahar was killed and two attempts were made on the life of the outgoing Governor of Helmand.³⁵¹ In October 2006, a suicide bomber killed the Governor of Paktya. Other killings included the Deputy Head of the Provincial Council of Takhar, the members of the *Shura-e-Ulema* (one in Kandahar, two in Helmand, one in Kunar).³⁵² Two judges, one from Sangin District of Helmand Province and the second one from Nirkh District of Maidan Wardak Province, were also killed by the *Taliban* in 2006.³⁵³

3. Afghans in areas where they constitute an ethnic minority

While attempts are being made by the Government to address the problems faced by Afghans residing in areas where they are an ethnic minority and improvements have taken place in some areas, such minorities may still in some regions face detention, physical abuse and intimidation by local commanders and power-holders. Discrimination amounting to persecution of ethnic minorities also occurs, most commonly in the form of denial of access to education and other services and political representation.

³⁴⁷ HRC, *Report of the High Commissioner for Human Rights*, paras. 46-52, see above footnote 144.

³⁴⁸ Committee to Protect Journalists, *Afghanistan: Web Journalists detained twice*, 25 September 2007, available at: http://www.cpj.org/cases07/asia_cases_07/afghan04july07ca.html.

³⁴⁹ HRC, *Report of the High Commissioner for Human Rights*, para. 30, see above footnote 144.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ International Herald Tribune and Associated Press, *List of major suicide attacks in Afghanistan*, 23 January 2007, available at http://www.iht.com/articles/ap/2007/01/23/asia/AS-GEN-Afghan-Suicide-Attacks-Glance.php#end_main.

Afghans of Pashtun ethnic origin from northern and central Afghanistan,³⁵⁴ in particular some districts of Jowzjan, Sar-i-Pul and Faryab and Kapisa, are possibly at risk of persecution and are unable to recover their land and property subsequent to displacement. Similarly, while most Afghan Gujurs from Baghlan were able to return, Afghan Gujurs from Takhar continue to face serious difficulties as mentioned above.³⁵⁵ Generally, asylum-seekers originating from areas where they are an ethnic minority are at heightened risk if they attempt to reclaim land and property.

4. Converts from Islam to other faiths

As explained in the Section on Freedom of Religion of this paper, the Constitution of Afghanistan is silent on issues of conversion and while calling for the respect of human rights and fundamental freedoms, defers to Sharia law for matters not explicitly dealt with by the Constitution. Under Sharia Law, conversion is punishable by death. As such, the risk of persecution continues to exist for Afghans suspected or accused of having converted to Christianity or other faiths.³⁵⁶

The case of Abdul Rahman imprisoned in March 2006 for converting from Islam to Christianity and threatened with a death sentence highlighted the extreme sensitivities surrounding religious freedoms in Afghanistan.³⁵⁷ While this case generated significant media attention, it is not an isolated case. Please see the Section on Freedom of Religion of this paper for more specific information on similar cases.

In light of the May 2007 Supreme Court ruling declaring the Baha'i faith distinct from Islam and a form of blasphemy, Afghans converting to the Baha'i faith face a risk of persecution similar to that of Christian converts:

*“Conversion from Islam is considered apostasy and is punishable by death under some interpretations of Shari'a. As in the case of blasphemy, an Afghan citizen who has converted from Islam (if a male over age 18 or a female over age 16, who is of sound mind) has three days to recant his or her conversion and is otherwise subject to death by hanging.”*³⁵⁸

³⁵⁴ Pashtuns are Afghanistan's largest ethnic group, but are a minority in the north. The Pashtuns' presence in the north is mainly the result of a deliberate policy of settlement carried out in earlier centuries. Since the demise of the *Taliban*, reports have continued to reach UNHCR of Pashtun villagers and civilians facing harassment, intimidation and discriminatory treatment, and acts of violence, banditry and persecution at the hands of local militia commanders and other members of the factions controlling the north.

³⁵⁵ UNHCR Meetings with Afghans local authorities, 2007.

³⁵⁶ ACCORD, *Country Report Afghanistan*, see above footnote 14. See also UN SC, *Situation in Afghanistan 11 September 2006*, see above footnote 186; see also US, *Religious Freedom Report 2007*, see above footnote 218.

³⁵⁷ M. Knust, see above footnote 222.

³⁵⁸ US, *Religious Freedom Report 2007*, see above footnote 218. In addition, the report states that: “[w]hile the ruling is unlikely to affect foreign-national Baha'is in Afghanistan, it could potentially create problems for the country's small Afghan Baha'i population, particularly on the question of marriage. Many Afghan Baha'is are married to Afghan Muslims, but the ruling could be used by courts to invalidate marriages between Baha'is and Muslims. This would create a noteworthy distinction between how the courts view the Baha'i faith vis-à-vis Christianity and Judaism, as Jewish and Christian women (but not Baha'i women) can be legally married to Muslim men. (Muslim women can only be married to Muslim men.) Afghan citizens who convert from Islam to the Baha'i faith face a risk of persecution, similar to that of Christian converts. It remains to be seen how the government will treat second-generation Baha'is who technically have not

Converts are likely to face serious problems as they are seen by family members and tribes as a source of shame and embarrassment. Converts are very likely to face isolation and strong pressure to reverse their decision and repent. In case of refusal, family members could resort to threats, intimidation, and, in some cases, physical abuse that could be life threatening.

5. Women with specific profiles

Afghan women who continue to be victims of persecution or face a risk of persecution may include, depending on the circumstances of the individual case:

- women who have adopted a Westernized way of life and who are perceived as or actually transgressing prevailing social mores, including women rights activists;
- foreign wives of Afghans; and
- women without male protection.

Women, both in urban and rural areas, must conform to conservative and traditional norms of behaviour in order to be safe from physical and psychological violence or abuse. Pressure to conform is very strong, both from within families and communities, and by the public. The conduct of women in the workplace is carefully watched. Afghan women who, having resided abroad, adopt “Western” values, which are considered to be inconsistent with social mores in Afghan society, would only be able to continue to enjoy relative social, cultural and economic freedom if they can rely on strong family protection.³⁵⁹ Such protection is more readily available in Kabul than in the provinces.³⁶⁰ UNHCR is aware of self-immolation cases of women returning from Iran. Those cases were reportedly rooted in the social restrictions imposed upon return. Women returning from Iran interviewed by UNHCR have also expressed frustration at the lack of available public and social opportunities and activities for women, and the serious restrictions to the freedom of movement often imposed by family members and society as a whole. In this respect, Afghan tradition imposes that women cannot travel freely without male escorts (*Maharam*). Furthermore, women are presented with the challenges of harassment and pressures from families to wear a *burka* or a *chador*.

Single females who do not have male relatives in Afghanistan, who are willing and able to provide support, face difficulties given social restrictions including on freedom of movement. In addition, lack of family protection and support expose single females to an increased risk of violence and forced marriage. Individual assessment of the effectiveness of family-links of unaccompanied female Afghans is crucial given that decades of war and poverty have damaged traditional family protection mechanisms and relationships. There is also the risk, should family-members decide to host a female relative, that she may suffer exploitation and the possibility of forced marriage.³⁶¹

The vulnerability of unaccompanied females in Afghanistan is the result of social traditions and gender values, according to which women should not live independently from their

converted, as they were born into families of Baha’i followers, but may still be viewed as having committed blasphemy.”

³⁵⁹ UNHCR Interviews with women returnees, 2006.

³⁶⁰ UNHCR Interviews with women returnees, 2006.

³⁶¹ HRC, *Report of the High Commissioner for Human Rights*, para. 19, see above footnote 144.

family. Where there is no family able to provide care and maintenance, single women can be accommodated temporarily in safe houses run by Afghan NGOs in Kabul and Herat. These constitute only a short-term “safe haven”, yet longer term solutions do not exist. Even in the case of domestic violence, the women or girl is often compelled by the lack of alternatives to return home.

Women’s rights activists face threats and intimidation, particularly if they speak out about women’s rights, the role of Islam or the behaviour of commanders.³⁶²

6. Unaccompanied children

Afghanistan acceded to the Convention on the Rights of the Child in 2002,³⁶³ and has strengthened national legal provisions to protect children. However, in the current situation characterized by weak rule of law and governance structures, the presence of local commanders, high levels of criminality, incidences of child trafficking and child labour, children continue to be exposed to exploitation. Many children are working in the streets of Kabul, Jalalabad, and Mazar-e-Sharif. The child work force in Afghanistan is predominately boys aged 8-14 with a smaller number of girls 8-10 years old. The main reasons that children work are poverty-related.³⁶⁴ The few existing orphanages in Kabul and the *marastoons*³⁶⁵ in other main cities, mostly run by the Government and the Afghan Red Crescent Society, are no durable solution for unaccompanied and separated children. They have very strict criteria for temporary admission. Boys 15 years old or over are not admitted. Children and adolescents above 15 years of age who do not have families, close relatives or extended family support in Afghanistan are therefore at risk of becoming homeless and, as a particular social group, may be subject to further exploitation. Where family tracing and reunification efforts have not been successful and special and coordinated arrangements can not be put in place to facilitate safe and orderly return, the return of unaccompanied children to Afghanistan exposes them to exploitation and abuse.

7. Victims of serious trauma (including sexual violence)

There is very limited psychosocial trauma support in Afghanistan.³⁶⁶ The concept of ‘counselling’ as a profession in public health services does not yet exist. All traumas are, if at all, dealt with by discussing it with family and friends. In this regard, of particular concern

³⁶² See for instance, Human Rights Watch, *Campaigning against Fear Women’s Participation in Afghanistan’s 2005 Elections*, August 2005, available at <http://hrw.org/backgrounder/wrd/afghanistan0805/afghanistan081705.pdf>.

³⁶³ Convention on the Rights of the Child, see above footnote 200.

³⁶⁴ According to a report on economic and social rights in Afghanistan, 48.8 percent of those interviewed, reported that at least one child in their household was working, 19.4 percent said that most children were working. Of the interviewees with children of primary school age in their family, the main reason given for why the boys in the family do not attend school regularly was that they have to work (36.6 percent), see Afghanistan Independent Human Rights Commission, *Economic and Social Rights in Afghanistan*, May 2006, available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&page=SUBSITES&id=449aabc2>.

³⁶⁵ ‘Places of assistance’ in Pashto, are a long-standing tradition in Afghanistan. Set up by the Government as public institutions in 1930, they offer temporary accommodation and education to the poorest of the poor. See, for instance, International Federation of the Red Cross and Red Crescent Societies, *Marastoons provide haven for Kabul’s destitute*, 12 August 2003, available at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/609d5c3a2a1d21dbc1256d800041ff52>.

³⁶⁶ In some regional hospitals, psychiatric facilities exist, but only one hospital in Kabul city provides psychological counselling, as does an international NGO, also based in Kabul.

is the situation of women, many of who have suffered forms of sexual violence, including rape.³⁶⁷ In addition, for both women and men who have suffered sexual violence, strong cultural taboos surrounding disclosure as a victim inhibit discussion, even with close family members. In more conservative areas, social mores dictate that identification as a victim of rape or other sexual abuse leads to family rejection and social ostracism and, thus, to the loss of traditional protection mechanisms. As it is reasonable to conclude that victims of this form of trauma risk further persecution if their history comes to light, traumatized Afghans who are in need of treatment and counselling, which is available sporadically in Afghanistan, should, in UNHCR's view, be offered international protection.

8. Individuals at risk or victims of harmful traditional practices

In the context of Afghanistan, harmful traditional practices, including forced and early marriage, honour killings, detention for behaviour not formally criminalised under national law, and blood feuds, impact both men and women. Women, however, continue to be disproportionately affected. The following groups are deemed to be exposed to a heightened risk of violence, harassment or discrimination:

- women and men at risk or victims of harmful traditional practices, including early and forced marriages, and exchange marriages;³⁶⁸
- women who intend to marry without the consent of their family, refuse to agree to marry the person chosen by their families, or who have married, for example in a country of asylum, non-Muslims and are perceived as having violated tenets of Islam;
- women and men at risk or victims of being punished for uncoded "morality" crimes; and
- women and men who might be at risk of becoming victims of a blood feud; in Afghan tradition, blood feuds are conflicts between opposing families, tribes and armed factions emerging from disputes and killings over property³⁶⁹ or the violation of women's honour.

The main threats to the physical safety of women often come from within the family. Family disputes often revolve around the position of women as it has direct implications on family honour.³⁷⁰ The authorities are generally unable and unwilling to intervene to protect women from threats emanating from their families. Women also continue to be imprisoned for social or sexual offences, such as refusing to proceed with a forced marriage, escaping an abusive marriage, or involvement in extra-marital relationships.³⁷¹ Authorities point out that sometimes such detention is necessary to protect the women from violent acts of revenge by their family members.

³⁶⁷ Any manifestation of what might be termed 'depression' is treated by medical professions with drugs. Doctors lack diagnostic and allopathic resources, thus depression is compounded by overdoses of Valium or other medication. Specialist care is unlikely to be found in Afghanistan. Rape is not a socially recognized category and is only rarely a legally recognized category. A report by the International Commission of Jurists found, women tend not to be treated equitably to men before the law. Rather they are judged according to customary law, whereby a victim of rape is more likely to be judged a prostitute and thus face prosecution than the perpetrator of the violation. Male victims of rape are not discussed. Sexual abuse of children is known but not acknowledged. There is no in-country support for rape victims.

³⁶⁸ In the context of Afghanistan this practice is referred to as "*Bad Dadan*".

³⁶⁹ Based on the Afghan traditional proverb "*zar, zan, zamin*" – gold, woman and land.

³⁷⁰ *Ibid.*

³⁷¹ HRC, *Report of the High Commissioner for Human Rights*, para. 15, see above footnote 144.

Women without effective male or family-support and single women of marriageable age are uncommon in Afghanistan, and continue to be viewed with some suspicion. They face a high risk of being married off by their families against their will. Single women are likely to be ostracized by the Afghan community, or fall prey to malicious gossip, which could destroy their reputation and social status. This exposes them to an increased risk of abuse, threats, harassment and intimidation by Afghan men, including risk of being kidnapped, sexually abused and raped. In the majority of these cases, the Government is not in a position to protect women.

Women returnees, widows and female heads of households often face numerous obstacles, including forced eviction and illegal occupation of land, difficulties in claiming inheritance, increased speculation on housing and land, forced marriage of widows to ensure that land and property remain within the family, and an inability to access courts.³⁷² With respect to widows, special consideration should be given to whether or not family-members of the late husband would expect her to re-marry. Traditionally, in several parts of the country, a brother of the late husband marries the widow, with or without her consent.

In the context of Afghanistan, a blood feud is a long-running argument or fight, with a cycle of retaliatory violence between parties – often, through guilt by association of individuals or groups of people, especially families or tribes with the relatives of someone who has been killed, or otherwise wronged or dishonoured. In such a situation, the victim’s family or tribe members seek revenge by killing, physically injuring and/or publicly shaming the perpetrator(s) or his/her family or tribe members.

Blood feuds are often initiated in reaction to alleged violations to the honour of women, property rights, land and water issues. In accordance with the norms of the *Pashtunwali* code the causes of blood feuds/culture of revenge are the violation of “*zar, zan, zamin*” – gold, woman and land. Killing or injuring as a result of a dispute over water and land, or unlawful relations with a woman create blood feuds and usually end with the death of the perpetrator, his/her family or tribe member, or an exchange of girls in compensation of crimes committed.

With decades of war and conflict, the tradition of blood feuds has expanded and is now common among armed factions, even including those of non-Pashtun ethnic origin, such as Tajik, Uzbek and Hazara.

9. Homosexuals

There is only limited information on the issue of homosexuality, given that this subject is taboo in Afghanistan. It is reported, however, that – in the past and particularly during the conflict – commanders, tribal leaders and others kept boys for sexual and other purposes. As one study has termed it, “*the prevalence of sex between Afghan men is an open secret*”. The practice of using young boys as objects of pleasure seems to have been more than a rare occurrence.³⁷³ Such relations are often coercive and opportunistic as more influential, older

³⁷² UN Economic and Social Council, *The situation of women and girls in Afghanistan, Report of the Secretary-General*, E/CN.6/2005/5, of 22 December 2004, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/660/96/PDF/N0466096.pdf?OpenElement>.

³⁷³ US Department of State, Bureau of Democracy, Human Rights, and Labor, *2006 Country Reports on Human Rights Practices: Afghanistan*, 6 March 2007, available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>.

men are taking advantage of the poor economic situation of some families and young males, leaving them with little choice. There are also a few documented cases of abduction of young boys for sexual exploitation by men.³⁷⁴

Overt homosexual relations are, however, not possible to entertain. Homosexual persons would have to hide their sexual orientation. Homosexuality is outlawed under Islam and punishable by death as a *Hudood* crime.³⁷⁵

10. Afghans associated with international organizations and security forces

Afghans working or associated with international organizations and security forces, in areas where there are anti-Government insurgent activities or infiltrations of *Taliban* and *Hezb-e-Islami* forces, continue to be at risk, and are, in fact, increasingly targeted.

The increase in targeted attacks and threats against Afghans working for international organizations and security forces are based on a perceived association with the central Government and its supporters. Leaflets warning Afghans not to work for the Government and its supporters, including the aid community, are distributed in those provinces where anti-Governmental elements are present and are able to operate.³⁷⁶

A number of incidents have been reported in 2006 and 2007 in Kandahar, Helmand and Kunar against Afghans accused of working for international military forces.³⁷⁷ The targets of such attacks have been civilian workers, such as truck drivers or construction workers. In 2007, kidnappings have also been on the rise both for political and criminal objectives. From January to May 2007 three high profile political kidnappings took place. While the first kidnapping targeting humanitarian workers was resolved with the release of all involved, the second involving a foreign journalist and his Afghan counterpart ended with the release of the foreign journalist and the beheading of the Afghani.³⁷⁸

³⁷⁴ UNHCR Interviews with Afghan authorities and returnees, 2006.

³⁷⁵ Art 130 of the Constitution states that: “*In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and within the limits set by this Constitution, rule in a way that attains justice in the best manner.*” See above footnote 10.

³⁷⁶ For example in Kandahar, leaflets were distributed, threatening to kill “one by one” any Afghans working for the US military. In Logar province, leaflets showing the photo of a victim who worked with a rural development NGO (DACAAR) killed in Ghazni province were found with threatening statements. In November 2003, leaflets were also found in Wardak Province that warned Afghans of the consequences of working with NGOs. These security threats have prompted several NGOs to cut back their activities in the provinces. The Red Crescent Foreign Relations and Planning Director, for example, confirmed that the attacks have placed severe limitations on the operations of his organization outside of Kabul, see H. Ibrahimi and S. Tarakhel, *Aid workers in peril*, Institute for War and Peace Reporting, 9 September 2003, available at http://iwpr.net/?p=art&s=f&o=153129&apc_state=henfarr153293. In addition to the threats that specifically target NGO workers, they could become victims to organized crime, which has become prevalent in the major cities such as Mazar Sherif, Jalalabad, and Kabul. Afghans working for aid organizations, particularly national organizations, are perceived to be wealthy. Therefore, they could also be subjected to robberies and the kidnapping of their family members in order to force them to pay a ransom, see Human Rights Watch, *Afghanistan: Escalating Attacks on Aid Workers and Civilians*, 27 June 2002, available at http://hrw.org/english/docs/2002/06/27/afghan4061_txt.htm.

³⁷⁷ HRC, *Report of the High Commissioner for Human Rights*, paras. 27-29, see above footnote 144.

³⁷⁸ BBC, *Taliban kill Afghanistan Reporter*, 8 April 2007, available at http://news.bbc.co.uk/2/hi/south_asia/6537097.stm.

11. Landowners

There are also circumstances in which Afghan landowners may be exposed to a risk of persecution by State and non-State agents. The risk is acute in circumstances where houses have been occupied by powerful commanders or local authorities, and restitution is being pursued by a landowner, even where there is a court decision for the return of the property. In such circumstances, the rightful owners may be at risk if they do not have political, tribal or family protection, and the authorities are unable or unwilling to protect their rights – including the enforcement of a court-decision.³⁷⁹ The real owners risk beatings or arrest and detention by local militia leaders or security officials.

A recent example of such persecution by the State and non-State agents is reflected in the outcome of a demonstration held by landowners on 1 July 2006 in Paghman district of Kabul against the occupants of their land.³⁸⁰ Two of the demonstrators were killed, a number of them were injured, and some 30 people were arrested by security officials and detained for some time while others had to flee from the country.³⁸¹ There are several other cases of land occupation by Government officials and former local commanders in different provinces of Afghanistan, for which the real owners have been detained, or warned not to raise the issue of land or compensation on the threat of death. Landowners resisting illegal expropriation can be viewed in relation to the 1951 Convention as having an imputed political opinion or being members of a particular social group.

12. Afghans associated with the People's Democratic Party of Afghanistan

Significant numbers of former People's Democratic Party of Afghanistan (PDPA) – subsequently renamed *Watan* (Homeland) – members and former security officials, including the Intelligence Service (*Khad*), are working in the Government.³⁸² In late 2003, a congress of the People's Democratic Party of Afghanistan (PDPA) took place in Afghanistan, which led to the creation of *Hezb-e-Mutahid-e-Mili* (National United Party), a new party registered in 2005 comprising 600 members. Former PDPA members have also reportedly founded several other parties.³⁸³

While many former PDPA members and officials of the communist Government, particularly those who enjoy the protection of and have strong links to influential factions and individuals, are not at threat, a risk of persecution may persist for some high-ranking members of the PDPA, if they were to return to Kunar province and some districts of the eastern region. The exposure to risk depends on the individual's personal circumstances,

³⁷⁹ UNHCR Interviews with Returnees, 2007.

³⁸⁰ The demonstration was against Rasul Sayyaf, a fundamentalist leader of the *Itehad-e-Islami* party and a current member of the Afghan Parliament, Haji Sheralam Ibrahim, a former local commander of the same party and the former governor of Ghazni province and *Itehad*'s armed militia.

³⁸¹ Revolutionary Association of Women of Afghanistan, *People of Paghman protest against Sayyaf*, 12 July 2006, available at <http://www.rawa.org/paghman.htm>.

³⁸² SocialistWorld.net, *Mafia, warlords and ex-Jihadi win elections*, 8 November 2005, available at <http://socialistworld.net/eng/2005/11/08afghanistan.html>.

³⁸³ For a comprehensive list of the registered political parties, see Islamic Republic of Afghanistan Ministry of Justice, List of "Licensed Political Parties", available at <http://www.moj.gov.af/polpartieslist.html> [accessed on 14 December 2007].

family background, professional profile, links, and whether he or she has been associated with the human rights violations of the communist regime in Afghanistan between 1979 and 1992.³⁸⁴

Those former PDPA high-ranking members without factional protection from Islamic political parties or tribes, or influential personalities, who may be exposed to a risk of persecution, include the following:

- high-ranking members of PDPA,³⁸⁵ irrespective of whether they belonged to the *Parcham* or *Khalq* faction of the party; they will be at risk if they are known and had a public profile; these encompass (1) high-ranking members of Central and Provincial Committees of the PDPA and their family members; and (2) secretaries of PDPA's committees in public institutions; and
- former security officials of the communist regime, including *Khad*, also continue to be at risk, in particular from the population – i.e. families of victims– given their association with human rights abuses during the communist regime.

When reviewing the cases of military, police and security service officials and high-ranking Government officials of particular ministries, it is imperative to carefully assess the applicability of exclusion clauses of Article 1F of the 1951 Convention, as many of these former Afghan officials were involved, to some extent, directly or indirectly, in serious and widespread human rights violations.

C. Considerations concerning exclusion on the basis of Article 1F of the 1951 Convention relating to the Status of Refugees

Given the long history of serious and widespread human rights abuse and violations of international humanitarian law in Afghanistan, exclusion considerations may well arise in individual claims for refugee status.

The exclusion clauses contained in Article 1F of the 1951 Convention provide for the denial of refugee status to individuals who otherwise would meet the refugee definition set out in Article 1A of the 1951 Convention, but who are deemed not deserving of international protection on account of the commission of certain serious acts. Given the possibly serious consequences of exclusion from international refugee protection, it is important to apply the exclusion clauses with great caution and only after a full assessment of the individual circumstances of the case. Every such case should be examined in relation to whether the excludable act falls within the definition of the crimes specified in Article 1F, as well as whether the person concerned could be considered as individually responsible for the act in

³⁸⁴ UK Home Office, *Operational Guidance Note: Afghanistan*, 20 April 2007, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46f0edbb2>.

³⁸⁵ The PDPA was founded in 1965 and split into two factions in 1967: *Khalq* (The People), led by Nur Mohammed Taraki and Hafizullah Amin, and *Parcham* (The Banner), led by Babrak Kamal. *Khalq* was more rural-based, mostly comprising of members of the Pashtun tribes. *Parcham* was more urban-oriented and was dominated by Dari speakers. In 1977, the two factions reunited under Soviet pressure. In 1988, the name of the party was changed to *Watan* (Homeland) Party. The PDPA-based Government collapsed in 1992 when, following the Peshawar Accords, Mujaheddin troops entered Kabul and the last President of a communist Government in Afghanistan, Mohammed Najibullah (previously head of the secret service *Khad*) had to seek refuge in a UN-building in Kabul where he stayed until he was killed by *Taliban* troops entering Kabul in September 1996.

question. Such responsibility flows from the person having committed or participated in a criminal act, or on the basis of command/ superior responsibility for persons in positions of authority. In this regard, the fact that a person was at some point a senior member of a repressive regime or a member of an organization involved in unlawful violence does not in itself entail individual liability for excludable acts. Moreover, applicable defences as well as proportionality considerations should form part of the decision-making process. Detailed guidance in applying the exclusion clauses can be found in UNHCR's Guidelines on International Protection.³⁸⁶

It is against this doctrinal background that the following categories of cases are described, which – in UNHCR's view – require a careful assessment of the applicability of exclusion clauses. The exclusion categories that follow are not intended to be exhaustive; individual cases outside the scope of these descriptions may warrant scrutiny under the exclusion clauses.

1. Members of the security forces, including *KHAD* agents and particular officials of the communist regimes

When reviewing the cases of military, police and security services officials, and those of high-ranking Government officials of particular ministries during the Taraki, Hafizullah Amin, Babrak Karmal, and Najibullah regimes,³⁸⁷ it is imperative to carefully assess the applicability of the exclusion clauses in Article 1F of the 1951 Convention. This includes cases of former members of *Khad* (*Khadamate Ettelaate Dowlati*), the State Information Service.

For individual cases of military officers of the Ministries of Defence and Interior and security services, it is relevant to assess their involvement in operations in which civilians were subject to arrest, disappearances, torture, degrading treatment and punishment, persecution and extrajudicial summary killings,³⁸⁸ such as, for example, the mass killings after the 1978 *coup* and the harsh reprisals against resistance to the decrees on land-reforms issued under Hafizullah Amin's regime. In addition, the role of such officials in military operations requires a close assessment as many have violated international humanitarian law by deliberately targeting civilians.³⁸⁹

³⁸⁶ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857684>.

³⁸⁷ This period of recent Afghan history started with a military *coup* on 27 April 1978, which brought to power a Government dominated by the PDPA, continued during the Soviet occupation, which started on 27 December 1979 and lasted until the fall of the Najibullah Government on 15 April 1992.

³⁸⁸ Amnesty International, *Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan*, ASA/11/04/79, and September 1979. See also UN Commission on Human Rights, *Report on the Situation of Human Rights in Afghanistan prepared by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights Resolution 1985/38*, E/CN.4/1986/24, 17 February 1986, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G86/105/43/pdf/G8610543.pdf?OpenElement>; Human Rights Watch, "Tears, Blood and Cries" *Human Rights in Afghanistan since the Invasion 1979 – 1984*, US Helsinki Watch Report, December 1984, available at <http://hrw.org/reports/1984/afghan1284.pdf>.

³⁸⁹ Human Rights Watch, *By All Parties to the Conflict: Violations of the Laws of War in Afghanistan*, Helsinki Watch/Asia Watch report, March 1988, available at <http://hrw.org/reports/1988/afghan0388.pdf> (further: "HRW, *By All Parties to the Conflict*"); see also Human Rights Watch, *The Forgotten War: Human Rights Abuses and Violations of the Laws of War since the Soviet Withdrawal*, 1 February 1991, available at <http://www.hrw.org/reports/1991/afghanistan/>.

2. Commanders and members of armed groups and militia forces

The activities of members of armed groups during the period of the armed resistance against the communist regimes and the Soviet occupation – from 27 April 1978 until the fall of Najibullah in April 1992 – need to be assessed carefully. Many activities amounted to war crimes and crimes against humanity, both against combatants of rival factions and against civilians. These encompassed: political assassinations, reprisals and extrajudicial killings, and rape, including of Afghan civilians for reasons such as working for Government institutions and schools, or transgressing Islamic social mores. Other violations included extra judicial executions of prisoners of war and attacks on civilian targets.³⁹⁰

The human rights and security situation in Afghanistan had deteriorated markedly, even before the interim Government, headed by Sebghatullah Mojaddedi, was established in Kabul, as agreed in the Peshawar Accords of 26 April 1992. The power conflict in Kabul and elsewhere in Afghanistan had begun between the various factions. The period between 1992 and 1996 characterized by competition and armed conflict for power and control between various factions was also accompanied by serious violations of international human rights law and humanitarian law.³⁹¹

Hence, specific commanders and members of the Islamic parties with armed factions require a close assessment, *inter alia*: *Hezb-e-Islami*, (*Hekmatyar* and *Khalis*), *Hezb-e-Wahdat* (both branches/or all nine parties that formed *Hezb-e-Wahdat*), *Jamiat-e-Islami* (including *Shura-e-Nezar*), *Jonbesh-e-Melli-Islami*, *Ittehad-e-Islami*, *Harakat-e-Inqilab-e-Islami* (lead by Mohammad Nabi Mohammadi) and *Harakat-e-Islami*.

3. Members and commanders of the *Taliban* and the *Hezb-e-Islami Hikmatyar*

The applicability of the exclusion clauses will come into play in relation to individual members and military commanders of the *Taliban*, during its time in power and after its overthrow, where their participation in serious violations of human rights and humanitarian law can be sufficiently established. The pattern of deliberate attacks on civilians by *Taliban* forces, summary executions, massacres, the deliberate and systematic destruction of livelihoods through a “scorched earth” policy, and forcible relocation are amply documented.

The applicability of the exclusion clauses will need to be evaluated also in relation to individual members and military commanders of the *Taliban*, *Hezb-e-Islami Hikmatyar*³⁹² and other armed groups currently involved in Afghanistan’s insurgency where their participation in serious violations of human rights and humanitarian law can be sufficiently established. Since early 2006, *Taliban*, *Hezb-i-Islami Hikmatyar* and other armed groups in Afghanistan have carried out an increasing number of armed attacks that either target civilians, or are launched without regard for the impact on civilian life. The pattern of

³⁹⁰ HRW, *By All Parties to the Conflict*, see above footnote 389.

³⁹¹ See for instance Amnesty International, *Afghanistan: The human rights and the refugee crisis*, ASA 11/02/95, February 1995; see also, Amnesty International, *Afghanistan: Executions, amputations and possible deliberate and arbitrary killings*, ASA 11/05/95, April 1995.

³⁹² Human Rights Watch, *The Human Cost: The Consequences of Insurgent Attacks in Afghanistan*, Volume 19 No. 6(C), April 2007, available at <http://www.hrw.org/reports/2007/afghanistan0407/>.

deliberate attacks on civilians by *Taliban* forces includes shooting ambushes, bombings and other violent attacks.³⁹³

D. Considerations relating to other forms of international protection

Individuals not qualifying for refugee status under the 1951 Convention criteria, perhaps due to the absence of a link to a specific Convention ground, may still be in need of international protection owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from events seriously disturbing public order. Significant areas of Afghanistan are still active combat zones and/or are not under effective government control. Given the lack of national protection available in these areas and the accompanying risk of violence, international protection should be favourably considered for persons originating from such areas.

UNHCR refers to such protection granted by States as “complementary protection”. Forms of protection vary; under some regional legal instruments such persons fall under an expanded refugee definition,³⁹⁴ while in other regions and countries, particularly in Europe,³⁹⁵ regional and national laws will dictate what forms of protection are granted.

In the context of Afghanistan, UNHCR advocates that where an individual case is found not eligible for refugee status, eligibility for a complementary form of protection, or in the case of UNHCR adjudication, the extended refugee definition, should be considered for persons originating from areas where any one or more of the following features have been reported or recently observed:

- intensified counterinsurgency activities, including aerial bombings, by ISAF/NATO, which have escalated into open warfare in the south, southeast and eastern provinces;
- indiscriminate attacks by anti-Government elements, through, *inter alia*, the consistent use of indiscriminate types of warfare (IED on the roads, missile attacks, bombs, and suicide bomb attacks) including attacks on “soft targets” such as schools, teachers, and religious figures;
- acts of intimidation, involving arbitrary killings, abductions and other threats to life, security and liberty, by anti-Government elements and by regional warlords, militia commanders and criminal groups; and
- illegal land occupation and confiscation with limited possibilities for redress.

³⁹³ *Ibid.*

³⁹⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), 10 September 1969, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36018>, and the Cartagena Declaration on Refugees (Cartagena Declaration), 22 November 1984, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36ec>.

³⁹⁵ The European Union Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (Qualification Directive), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4157e75e4>, establishes the conditions for granting subsidiary protection to persons facing a real risk of suffering “serious harm”. Pursuant to Article 15 of the Qualification Directive, serious harm consists of: (1) death penalty or execution; (2) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (3) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

With regard to the situation as of November 2007, this would apply to a number of areas in the south, southeast, north, northeast, east, west and the central regions of Afghanistan.³⁹⁶ Insecurity has also greatly affected freedom of movement in areas currently affected by the insurgency and other criminal actors seriously disrupting civilian, commercial and Government activities. Hence, Afghans residing in these areas, or travelling through unsafe areas, are exposed to high risks of indiscriminate violence. Specific security risks faced by Afghans travelling through unsafe areas include being caught in ambushes, aerial bombings, crossfire as a result of military operations, and harassment at insurgent checkpoints. Afghans perceived to be associated, in any way, with the international community or the Government are deemed to be particularly at risk when travelling through insurgency-affected areas.

E. Humanitarian considerations with regard to return to Afghanistan

There are some Afghans who may not qualify for international protection under the refugee definition but for whom UNHCR urges States, for humanitarian reasons, to exercise caution when considering their forced return. In the context of return to Afghanistan, extremely vulnerable cases include the following:

1. Single parents with small children that lack income or family and/or community support

Single parents with small children, particularly women given cultural restrictions on freedom of movement and work, will be unable to subsist in Afghanistan in the absence of family or community support, including financial assistance.

2. Unaccompanied elderly

Elderly who lack support of relatives or their community of origin are often at risk in Afghanistan. Generally, elderly cannot work or, otherwise provide for themselves and are dependent on family support. In the absence of such support, they risk extreme hardship. Although communities may provide one or two days of voluntary work (*ashar*) for vulnerable elderly individuals, who may spend days and nights at mosques, living on the charity of those attending prayers, support is not available from public sources. There are no shelters or homes for elderly persons, either in Kabul city or in other locations in Afghanistan. In UNHCR's view, elderly individuals without family members willing and able to provide support can not sustain themselves if returned to Afghanistan.

3. Persons with medical illness or disability (physical or mental)

Ill or disabled persons who cannot work or live on their own in Afghanistan should not return unless they have effective family and/or community support. Examples are persons permanently disabled by diseases such as polio or meningitis, landmine victims, persons injured during the war, accident victims, and persons with severe handicaps or birth defects, including blind, deaf and mute persons. Similarly, mentally ill persons who need long term treatment or special care will not be able to cope in Afghanistan without family assistance. There are very few specialized institutions and personnel. This is particularly problematic for

³⁹⁶ Owing to the rapidly changing security environment, UNHCR does not offer a list of insecure areas in this paper. The Office does, however, monitor developments in the situation in various areas of Afghanistan and can be contacted for periodic comment.

persons suffering severe mental illnesses, who, as a result, are not self-sufficient. It should be noted that occasional drug users are often believed to be mentally ill by their families. Drug use reduction programmes, albeit part of the counter-narcotics strategy of the Government of Afghanistan, are nascent and offer extremely limited facilities, all with long waiting lists.

For persons with certain medical conditions, return to Afghanistan would be extremely challenging, unless effective family or community support and care is available during the treatment period. Those include patients suffering from leprosy, myocardial infarction, tuberculosis, bone fractures, complicated diabetes, complicated chronic obstructive pulmonary diseases, osteomyelitis, minor mental disabilities and complicated rheumatic arthritis.³⁹⁷ Given that only basic services are provided in the hospitals, family assistance would be necessary to purchase medicines, assist the patient in every-day essential activities such as movement, personal hygiene and the provision of food. For others, treatment and medication may not be available in Afghanistan for the time being. Examples of such cases are patients with HIV/AIDS; patients who need heart surgery, organ transplant and micro neurosurgery; patients of cancer who need radiotherapy; haemophilic patients and patients with renal failure.³⁹⁸ Additionally, secondary, depending on the location, and tertiary health care services continue to be very limited.

Against this background, there are Afghans for which UNHCR strongly advises that, at least temporarily, solutions be identified in countries of asylum and that exemptions to obligations to return are made on humanitarian grounds.

F. Internal flight or relocation alternative

In the context of the assessment of a claim to refugee status in which a well founded fear of persecution has been established in some localized part of the country of origin, the assessment of whether or not there is a relocation alternative in the individual case requires two main sets of analysis: its relevance and its reasonableness. For both, the personal circumstances of the individual applicant and the conditions in the country of origin need to be considered.³⁹⁹

With regard to the “relevance” of an internal flight or relocation alternative, it is of particular importance to assess the willingness and the ability of the State to protect from risks emanating from non-State actors. Local commanders and armed groups act as agents of persecution in the Afghan context, both at the local and central levels.⁴⁰⁰ In some cases, they are closely associated to the local administration, while in others they may be linked to and protected by more powerful and influential actors, including at the central level. As a result, they largely operate with impunity, with the State authorities being unable to provide

³⁹⁷ The information provided in this section of the paper is the result of a UNHCR survey of health facilities available in Afghanistan. Discussions have included a broad spectrum of health care providers, *inter alia*, Cure International Hospital, Blossoms International Hospital, D K German Medical Diagnostic Centre, Kaisha Health Care (Indian Hospital), Enfants Afghans (French Paediatric Hospital), and Escorts Amiry (Cardiology Hospital).

³⁹⁸ *Ibid.*

³⁹⁹ UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, p. 3, available at <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=3f2791a44> (further: “UNHCR, *Internal Flight or Relocation Alternative*”)

⁴⁰⁰ HRC, *Report of the High Commissioner for Human Rights*, see above footnote 144.

protection against risks emanating from these actors. In most instances, the State is unable to provide effective protection against persecution by non-State actors. The links to other actors may, depending on the circumstances of the individual case, expose a person to risk beyond the zone of influence of a local commander, including in Kabul. Even in a city like Kabul, which is divided into neighbourhoods (*gozars*) where people tend to know each other, the risk remains, as news about a person arriving from elsewhere in the country travels fast.

In the absence of a risk of persecution or other serious harm upon relocation, it must also be reasonable for a claimant to relocate. Such an assessment must take into account the elements of safety and security, human rights standards and options for economic survival in order to evaluate if the individual would be able to live a relatively normal life without undue hardship given his or her situation.⁴⁰¹

The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Furthermore, the protection provided by families and tribes is limited to areas where family or community links exist. As documented in studies on urban vulnerability, the household and the extended family remain the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution are less effective in the extended urban family.⁴⁰² It is therefore very unlikely that Afghans will be able to lead a relatively normal life without undue hardship upon relocation to an area to which he or she has no effective links, including in urban areas of the country.⁴⁰³

G. Consideration relating to cessation on the basis of Article 1C(5) and (6) of the 1951 Convention with regard to Afghan refugees and persons determined to be in need of international protection

Under Article 1C of the 1951 Convention, refugee status may cease either through a change in the personal circumstances of the refugee or through changes in objective circumstances in the country of origin upon which refugee status was based. With respect to the latter, the changes must be fundamental, durable and effective.

In the light of Afghanistan's protracted conflict, a particularly important consideration is the quality of national protection. This entails more than physical security or safety; it includes

⁴⁰¹ UNHCR, *Internal Flight or Relocation Alternative*, see above footnote 399.

⁴⁰² Schütte, *Urban Vulnerability in Afghanistan*, see above footnote 309.

⁴⁰³ Action Contre la Faim, *Kabul Vulnerability Mapping*, January 2004, available at: http://www.aah-usa.org/news/Kabul_report.pdf. The report indicates that some specific parts of the city, notably the Central Bazaar area, experience an extremely high housing density, with 51 percent of the families there living in a single room. It also illustrates that families have to deal with a very high level of insecurity at the household level, as 33.48 percent of the main income earners relied on daily wage. The irregularity of their income, and therefore ability to pay rent, constitutes a main source of concern. In Kabul and its surroundings, rents vary from an average of US \$50 dollars rent, for a basic one room without any facilities, to US \$ 3000 in the prominent areas of Kabul, such as Wazir Akbar Khan. Recently, Kabul prices have escalated to an average of rental at 300 percent of professional monthly income, even in the outskirts of the city. In rural areas, it is not possible to rent. People own their homes; war and increased family size means that most houses are overpopulated, and for land free of encumbrances – landmines, clear ownership rights is extremely rare. In urban areas, there is often a shortage. With an average salary of US \$ 20, families are unable to afford even the average rents of US \$ 150.

the prevalence of peace and security, the presence of a governing authority, basic structures of administration including a functioning system of law and justice, and the ability of residents to exercise their right to a basic livelihood.

Despite positive achievements during the implementation of the Bonn Agreement, since 2002 Afghanistan's progress to durable peace and development remains slow and uncertain. Voluntary repatriation has been the key durable solution successfully and substantially pursued to date.⁴⁰⁴ However, the current situation in an increasing number of districts and provinces in Afghanistan has called its continued sustainability into question. This is reflected in the declining repatriation figures to these areas; indeed, the downward return trend to Afghanistan witnessed overall since 2006 is an important indicator of the changing situation in the country.⁴⁰⁵

The deteriorating security situation during 2007 is characterized by heightened levels of anti-Government violence in the south, southeast, east, central, and western parts of the country. The severity and consistency of violent incidents initiated by anti-Government elements, as well as the number and intensity of counterinsurgency military operations, has had a significant impact on the lives of the population in the affected areas. Combat operations by pro-and anti-Governmental forces have resulted in the death or injury of civilians, and have become leading causes of internal displacement.⁴⁰⁶ The national security forces have increasingly struggled to exercise authority in significant parts of the country. They are currently unable to claim a primary role in the provision of security in those areas or to reverse the negative trends witnessed during the year.

Afghanistan's revenue generating capabilities remain very modest. The Government currently relies heavily on external financing to support even its basic operating costs. The effects of the influential narcotics sector on the quality of public administration have also been well documented. Under these circumstances, the ability of the national and provincial institutions to unite, lead and administer a fragmented, ethnically diverse society, and to protect and improve the basic rights, lives and livelihoods of its citizens, remains limited.

It is true that significant political changes have occurred in Afghanistan. The *Taliban* regime has been removed, elections were organised and a new Government has been formed. In UNHCR's view, however, these developments have not led to a situation where the cessation clauses of Articles 1C(5) or (6) of the 1951 Convention could be invoked. The changes in Afghanistan have not generated stability and effective governance. In many parts of the country, armed conflict continues to seriously affect the civilian population. National protection against this violence is not available. In conclusion, in relation to Afghans who were granted refugee status on the basis of a well-founded fear of persecution during the previous regime, or who are already benefiting from a complementary form of protection, the "ceased circumstances" cessation clauses under Article 1C(5) or (6) of the 1951 Convention should not be applied. Guidance on assessing the change of circumstances may be drawn from UNHCR's Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses).

⁴⁰⁴ UNHCR, *Operational Information*, Part 1, see above footnote 322.

⁴⁰⁵ UN GA, *Situation in Afghanistan 21 September 2007*. See above footnote 25.

⁴⁰⁶ *Ibid.*